The

ARBITRATION JOURNAL

ARTERLY OF THE AMERICAN ARBITRATION ASSOCIATION

Volume 13, No. 1 1958

THE ARBITRATION JOURNAL

VOLUME 13 1958 NUMBER 1

The Arbitration Journal is published quarterly by the American Arbitration Association, Inc.: Nicholas Kelley, President; Sylvan Gotshal, Chairman of the Board; Paul M. Herzog, Executive Vice President; A. Hatvany, Secretary-Assistant Treasurer. Annual subscription: $4 in the United States; $4.50 elsewhere in the Western Hemisphere; $5 foreign; single copies $1.50.

AN EDITORIAL

A CONFERENCE on International Commercial Arbitration will be convened in New York from May 20 to June 10, 1958, under the auspices of the United Nations' Economic and Social Council. At this Conference, governments, specialized agencies and non-governmental organizations will consider a Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A further topic on the agenda will be the consideration of "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes." The Draft Convention deals with an important subject, the enforcement of commercial arbitration awards in a country other than the one where the award has been rendered.

Indeed, commercial arbitration cannot become effective in the international field without some kind of summary enforcement proceedings in most of the trading countries of the world. Differences of law and practice make unification advisable. A long road must be followed to attain uniformity of national laws on arbitration which, of necessity, are based on different systems of law, different backgrounds and different relationships. But one facet affords a good opportunity for unification: the enforcement of foreign arbitral awards. Here, the issues are rather similar: parties residing in different countries have agreed in their commercial arrangements that future disputes shall be settled by arbitration, mostly through institutional bodies with rules of arbitration procedure.

Unification of the law of enforcement had been attempted by a previous Convention, concluded in 1927 in Geneva. Although neither the United States nor any other nation of the Western Hemisphere adhered to this Convention, the execution of foreign awards has nevertheless been favorably considered by American courts. A most recent example is a decision of the New York Supreme Court of Feb-

ruary 4, 1958, 117 N.Y.S. 2d 378, where a British arbitration award, rendered under the rules of the London Corn Trade Association, was enforced in New York.

Moreover, among the Treaties of Friendship, Commerce and Navigation which the United States has concluded in recent years, there are no less than thirteen which expressly provide for the mutual enforcement of arbitration agreements and the execution of awards. Those treaties are with: Ireland, Greece, Israel, Italy, Denmark, Japan, Colombia, West Germany, Haiti, Iran, Nicaragua, the Netherlands, and Korea.

(*Continued on Page* 63)

AMONG OUR CONTRIBUTORS

CHARLES C. KILLINGSWORTH is Professor of Economics and head of the Department of Economics at Michigan State University. He is a prominent arbitrator of labor-management disputes in the Midwest, and has served as impartial chairman for large companies and unions in the rubber and steel industries. During World War II he was a public member of the National Wage Stabilization Board.

ALLAN PHILIP, a member of the bar in Denmark, teaches law at the University of Copenhagen. In 1957 he published a book on "American-Danish Private International Law" for the Parker School of Foreign and Comparative Law, Columbia University.

G. L. BANSAL is Secretary-General of the Federation of Indian Chambers of Commerce and Industry. In this capacity he helped negotiate an agreement for reciprocal use of arbitration machinery and services with the American Arbitration Association. This agreement was published in *The Arbitration Journal,* p. 155, 1955.

GRIEVANCE ADJUDICATION IN PUBLIC EMPLOYMENT*

by Charles C. Killingsworth

Government today is the largest employer in our economy. In 1957, federal, state and local units of government together employed approximately 7.4 million civilian workers. About a third of this number were in the federal government, half were employees of local governments, and the remainder (seventeen per cent) were state employees. To put it another way, today one of about every seven wage and salary workers in the United States is a government employee. Furthermore, the trend is upward. In 1929, there were about three million government employees, who constituted about ten per cent of all wage and salary earners. Now government employees constitute fourteen per cent of the total.[1] Whether or not this trend is desirable has been widely debated, but few people expect it to be reversed.

Public employment has its special industrial relations problems, which are numerous and intriguing, but which have received surprisingly little attention from academic students of the labor field.[2] Dur-

* A paper read at the 1958 annual meeting of the National Academy of Arbitrators. It will be published by the Bureau of National Affairs, Inc., in the Spring of 1958 in a book, "The Arbitrator and the Parties—Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators." Permission to reprint has been granted by the copyright owners, BNA Incorporated, Washington, D. C.

1. *Economic Report of the President,* January 1958, p. 140; Irving Stern, "Government Employment Trends," *Monthly Labor Review,* July 1957, pp. 811-815.
2. Although the literature is sparse, there are some articles, books, reports, and speeches which are excellent treatments of some aspects of the problem. This is not the place for a comprehensive bibliography, but the following examples may be cited: Floyd W. Reeves and Paul T. David, *Personnnel Administration in the Federal Service,* No. 1, President's Committee on Administrative Management, 1937; Sterling D. Spero, *Government as Employer,* 1948; National Civil Service League, *Employee Organizations in the Public Service* (undated); two reports (1952, 1955) by the Committee on Labor Relations of Governmental Employees of the American Bar Association; M. R. Godine, *The Labor Problem in the Public Service,* 1951; Eli Rock, "Practical Labor Relations in the Public

ing the past twenty years or so, scholars have written thousands of words about industrial relations in every important industry in the United States, and they are now embarking on studies in foreign lands. The investigation of industrial relations problems of government agencies in the United States has been left chiefly to government administrators, who appear increasingly to believe that government can profit from an examination of practices, policies and procedures in private employment and from a consideration of the possibilities of adapting them to public employment. To cite some examples: The Labor Department of New York City has made recommendations to the Mayor, based on extensive studies, for a city labor relations policy which would incorporate many of the practices of private industry. The City of Philadelphia has employed Eli Rock as a labor relations consultant for several years, and it recently became the first large city in the United States to enter into a collective bargaining agreement providing for exclusive recognition of one union as the representative of all non-uniformed city employees.[3] At the request of the Michigan Civil Service Commission, the Labor and Industrial Relations Center at Michigan State University has undertaken an analysis of grievance and appeals procedures in the state service for the purpose of submitting recommendations for improvement.[4]

This paper is concerned with one strategic industrial relations problem in public employment: the final disposition of employee grievances which cannot be amicably adjusted. The employer-employee relationship, whether in public or private enterprises, inevitably involves frictions which produce grievances. In the sector of private employment covered by labor-management contracts, the solution to this problem which has been almost universally accepted is final and binding arbitration. It is estimated that more than 90 per cent of all collective bargaining agreements today provide arbitration by a neutral as the termination device for unsettled grievances arising un-

---

Service," *Public Personnel Review*, April, 1957, pp. 71-80; Joseph P. Goldberg, "Constructive Employee Relations in Government," *Labor Law Journal*, August, 1957, pp. 551-556; and a series of monographs issued in 1955 by the New York City Department of Labor.

3. The city has had contracts since 1944 with the same union (District Council No. 33 of the American Federation of State, County and Municipal Employees), and it has bargaining relations with representatives of firemen and policemen also.
4. Associated with the author in this project are Melvin J. Segal, faculty research associate in the Center, and (during 1957) William Van DeVeer, graduate assistant.

der the contract. Even in the absence of any other evidence, this widespread acceptance of arbitration as the final step in the grievance procedure would indicate that labor and management in private industry have found that this device meets an important need. Yet arbitration is all but unknown in public employment. The purposes of this paper are to explain why this is so, and to consider whether industrial relations in government might be improved by an adaptation of the principle of neutral adjudication of unresolved grievances.

We must begin with a consideration of the differences between public and private employment which are significant for our purposes. At the risk of carrying coals to Newcastle, let me state briefly the institutional foundation on which private grievance arbitration rests. An arbitration system in private industry is usually established by an agreement between an employer and a union. The union typically is the exclusive bargaining representative of the employees. This arrangement basically rests on a rather elaborate structure of law and practice protecting the right of employees to join unions of their own choice, providing for designation by public authority of the appropriate bargaining unit, and guaranteeing to the union chosen by the majority in that unit the right to serve as the exclusive representative of the employees. The essential elements of this institutional framework are almost wholly absent in public employment.

Generalizations about public employment are hazardous because of the tremendous diversity of government operations. There are exceptions to almost any generalization that might be formulated. However, there are some widely prevalent characteristics of public employment which should be noted here.

At least in theory, the people are sovereign in a democracy, and it is all of the people who are ultimately the employers of government workers. The sovereign people have delegated their functions, responsibilities, and prerogatives as employers; but the system of "checks and balances" in our form of government has resulted in diffusion of the delegated authority. The legislature generally determines basic conditions of employment, such as wage rates and fringe benefits. The courts provide some protection for job rights of public employees. Probably the executive branch has the greatest responsibility for industrial relations. However, even within the executive branch, we find a much greater diffusion of authority than is common in private industry. Line or operating officials have the major responsibility for day-to-day direction of employees and they have a great

deal of control over working conditions. However, much independent authority is vested in a civil service commission or board.

Civil service is the creation of reformers of several generations ago who thought that public administration would be improved by eliminating the spoils system. Hence, civil service commissions are given considerable formal independence from political officials and are vested with many strategic management functions, such as determination of qualifications for employment and establishment and administration of job classification systems. Most commissions also review, sometimes before the event, discharges or other disciplinary actions against employees. The degree of actual independence from operating officials varies, of course. In some jurisdictions, the commission may give rubber-stamp approvals to most decisions of operating officials. But, on the other hand, the Michigan Civil Service Commission has the constitutional authority to order general wage and salary increases without reference to the legislature; and the Commission's operating budget is constitutionally fixed at a percentage of total state payrolls. In general, the civil service commission in most jurisdictions has much greater independence from operating officials than does the personnel or industrial relations department in a private enterprise.

Another characteristic of public employment is the almost universal acceptance of the idea that public employees have no right to strike. A firm stand on this point helped to make Calvin Coolidge President of the United States. Another governor of another generation, but with the same aspiration, put the matter in this way in 1947:[5]

> "A public employee has as his employer all the people. The people cannot tolerate an attack upon themselves. . . . A strike against government would be successful only if it could produce paralysis of government. This no people can permit and survive."

Realism requires recognition of the fact that public employees do use the strike weapon. New York City's subway riders can testify on this point; and a number of years ago, a book was published bearing the intriguing title, *One Thousand Strikes of Government Employees.*[6] Nevertheless, the strike is certainly not a generally effective or widely-used weapon in public employment.

5. Statement by Governor Thomas E. Dewey of New York on signing the Condin-Wadlin Act; quoted in *New York Times,* March 28, 1947.
6. By David Ziskind; published 1940.

GRIEVANCE ADJUDICATION IN PUBLIC EMPLOYMENT

Collective bargaining in private industry presupposes the freedom of the employees to withhold their labor, in the event of disagreement. The legal limitations on strikes by government employees, added to the other distinguishing characteristics of public employment, place their collective bargaining efforts on a different basis. There is rather widespread acceptance of the idea that genuine collective bargaining is impossible in the public service. Furthermore, law officers of governmental units have argued, and courts have sometimes held, that agreements between unions and government agencies are an illegal delegation of authority. These doctrines are not universally accepted, as is shown by the fact that one of the many public employee unions is party to 136 bilateral contracts in 22 different states.[7] But only a very small fraction of government employees are covered by collective bargaining arrangements.

Generally speaking, there is no statutory protection of the right of public employees to join unions, there is no machinery for determining appropriate bargaining units or for holding representation elections, and there is no doctrine that the majority representative must be the exclusive representative of the unit. Such statutory provisions covering private employment assume the legitimacy or the desirability of collective bargaining, an institution which is still regarded with suspicion or hostility by most governmental units so far as their own employees are concerned.

Under these circumstances, it is not surprising that there is less union organization in government than in private industry. Roughly 18 per cent of all government employees belong to unions, as compared with about 34 per cent of all non-governmental wage and salary workers. The extent of organization is considerably greater on the federal level than on the state and local level. About 36 per cent of the federal employees belong to unions; probably no more than 10 or 15 per cent of the employees at the state and local level are union members. About one million of the 7.4 million government employees are so-called "blue-collar" workers, and it is among this group that unionism is numerically strongest. In the federal service, for example, nearly half of all the union members are in the Post Office.[8] Another common characteristic of public employee organi-

7. Information supplied by Department of Research and Service, American Federation of State, County and Municipal Employees. This union also reports 76 "unilateral agreements" in the form of statements of policy or resolutions by employing authorities.

8. Statistical estimates based on the following: Goldberg, *op. cit.*; Roland

zation is multiple unionism. The Post Office employees are divided among eleven unions, many of them with overlapping jurisdictions, and this situation is by no means unusual.

The foregoing summary makes it easy to understand why one authority has said that there is one word which best characterizes the practice of industrial relations in public employment—and that word is "chaotic".[9] Clearly, the preconditions on which private grievance arbitration depends are all but non-existent in government. It might at first appear futile to attempt to adapt private arbitration to such an inhospitable environment. Yet government jurisdictions have accepted the principle of impartial participation in grievance adjudication in sufficient numbers to suggest that this device can make a substantial contribution in government as it has in industry.

Most of the larger governmental jurisdictions have recognized the need for formal grievance and appeals procedures. This fact is shown by a questionnaire survey undertaken last fall by Michigan State University and the Michigan Civil Service Commission. Except where otherwise noted, the ensuing information is taken from the questionnaire returns, which covered eighteen jurisdictions, including the more populous states, the largest cities, the TVA, and the federal government. These jurisdictions account for about 38 per cent of total government employment.

The approaches now used in the final adjudication of employee appeals can be roughly classified into four main categories. The first is final and binding arbitration by neutrals selected by mutual agreement of the agency and the employee representatives. This method is rare. Some examples are found in proprietary activities of government. The Tennessee Valley Authority has had a conventional arbitration clause in its contract with a council of unions for a number of years. Some other public power authorities and autonomous government corporations have followed this example.[10] The New York City Transit System finally adopted this type of procedure after a number of years of experimentation with other devices, including the use of an "impartial advisor". There are also examples of arbi-

---

Posey, "Employee Organization in the United States Public Service," *Public Personnel Review*, October, 1956; *Fortune*, May, 1955; plus examination of union membership figures reported by the U. S. Department of Labor and the National Industrial Conference Board. "Employee associations" which sometimes undertake some of the functions of unions are not included in these figures.

9. Eli Rock, *op. cit.*
10. Spero, *op. cit.*

tration clauses covering more than merely proprietary activities. The American Federation of State, County and Municipal Employees has provided me with a list of more than seventy of its agreements containing such clauses.[11] Among the cities included in this category are New Haven[12] and Norwalk, Connecticut; Niagara Falls and Troy, New York; Dayton, Ohio; and Racine, Wisconsin. A few other municipalities have similar clauses in contracts with unions like the Teamsters which are composed mainly of employees in private industry.

The second category is adjudication by a permanent appeal board established by law and independent of operating agencies and the civil service commission. This arrangement is found in two states, Connecticut and Massachusetts. In both of these states, the decisions of the appeal boards are final, but their jurisdiction excludes some important matters, particularly classifications and examinations. A hybrid arrangement is found in New York State, which has a statutory classification and compensation appeals board with one member representing the Civil Service Commission, one representing the Budget Director, and three state employees.

The third and most popular category is adjudication by, or under the control of, a civil service commission. This arrangement is found in New Jersey, Maryland, Minnesota and Wisconsin, where the commission itself (or some of its members) hears all appeals. In California, Illinois, Louisiana, the City of Los Angeles, and the United States Government, full-time employees of the commission hear appeals, with appeal to or review by the commission itself.

An important variation on the third type is found in Michigan and New York State, where proceedings remain under the control of the commission but with provision made for participation by outside neutrals. The Michigan Commission has established a panel of hearing board members who are assigned in groups to hear particular appeals. None of the hearing board members are state employees. Their decisions may be appealed to the Commission, but most are not. In New York State, the President of the Commission appoints a Grievance Board composed of one employee of the Commission and two representatives of the public. This board considers matters other

11. Information supplied by Department of Research and Service.
12. Recently an Academy member, Dean L. J. Ackerman, arbitrated a dispute between New Haven and the AFSCME under the auspices of the American Arbitration Association, *The Public Employee*, February, 1957, p. 13.

than classification and compensation, and its "findings and recommendations" are not appealable, but in some situations they are only advisory in effect. The members of this board serve "at the pleasure" of the President of the Civil Service Commission.

The fourth category can only be called "miscellaneous." Pennsylvania provides for the appointment of a tripartite, advisory fact-finding panel at the request of any employees whose complaints or requests have not been satisfactorily resolved.[13] Philadelphia provides for an "advisory board" with a neutral chairman as the final step in a formal grievance procedure. In many jurisdictions, the final appeal is to the chief operating official—mayor, governor, township supervisor, or the equivalent. There are many other variations; but the foregoing examples indicate the diversity of techniques now in use in public employment for the final resolution of employee grievances.

No doubt this diversity reflects to some degree the widely varying circumstances of public employment. Other sources of diversity are statutes and judicial decisions which, in many jurisdictions, limit the freedom of action of the governmental agencies involved. But some of the diversity is clearly the result of confusion and uncertainty. Perhaps a critical examination of the main types of settlement techniques may help to clarify the nature of some of the problems and suggest some possible answers.

Final and binding arbitration of public employee grievances can be used in only a very limited number of situations. As already stated, the successful operation of this technique presupposes the kind of established collective bargaining relationship which is rare in public employment. Furthermore, there are legal barriers to arbitration in some jurisdictions. As already noted, there have been some rulings that even collective bargaining agreements are illegal. Some courts have specifically held that a public agency cannot enter into an agreement to arbitrate and to be bound by the result, because such an agreement is an illegal delegation of the authority entrusted to the public agency by the sovereign people.[14] However, no distinction has

13. Pa. Stat. Ann. tit. 43, Sec. 215.1, 1947, as amended.
14. Perhaps the leading case on this point is Mugford v. Mayor and City Council of Baltimore, Circuit Court of Baltimore, April 13, 1944, 8 C.C.H. Labor Cases 62137. See also Everett Fire Fighters v. Johnson, Washington Supreme Court, Jan. 7, 1955, 35 L.R.R.M. 2434; and Groehn v. Michigan Corporation and Securities Commission, Michigan Supreme Court, Nov. 26, 1957 (Court held that Civil Service Commission could provide for *assistance* in hearing cases, but "the final authority and responsibility remain its own . . .").

been made in these decisions between the arbitration of substantive terms of employment and the arbitration of grievances over the application of those terms of employment to particular cases. Such a distinction was made by the highest court of Connecticut in reaching the conclusion that grievance arbitration is permissible,[15] which perhaps helps to explain the fact that two Connecticut municipalities have arbitration clauses in contracts with the AFSCME. Even if the opposition of courts and legal officers could be overcome in other jurisdictions, it seems unlikely that conventional arbitration would be widely adopted in the absence of other basic changes in the structure of industrial relations in government.

The use of an independent, permanent appeal board in public employment is superficially similar to the permanent umpire system in private industry. An important difference is that its personnel is not chosen by the parties who are expected to abide by its decisions. One consequence of this difference is likely to be a relatively high ratio of decisions appealed to the courts. Further, it has been pointed out that in the past there has been some tendency to appoint "lame-duck politicians" to such boards.[16] However, assuming the necessary statutory authorization, and assuming the appointment of qualified personnel—crucial assumptions—the independent appeal board can provide some of the important benefits of third-party adjudication. There seems to be no persuasive reason for excluding classification and examination appeals from the jurisdiction of such boards, as is done in both Massachusetts and Connecticut. I will return to this point shortly.

Dependence on adjudication by a civil service commission or by its own employees involves several difficulties, some practical and some conceptual. In the larger jurisdictions, the commission is primarily a policy-making body, and it simply does not have the time necessary for lengthy hearings and careful consideration of individual grievances that are appealed. Delegation of grievance adjudication to subordinates only partly solves the problem if the commission takes seriously its obligation to review the performance of the subordinates.

A more fundamental difficulty grows out of the dual role assigned to the typical civil service commission: to represent the public

15. Norwalk Teachers' Assn. v. Board of Education, Connecticut Supreme Court of Errors, July 30, 1951, 28 L.R.R.M. 2408. Rather surprisingly, the court held that the dismissal of a teacher did not constitute an appropriate subject for arbitration.
16. Spero, *op. cit.*, p. 406.

interest in protecting civil servants from sinister political influences; but also to perform such clearly managerial functions as classification of jobs, and determination of qualifications for appointment and promotion. Hence, in one sense the civil service commission is distinct from management; but in another sense it is really a part of management.

The commission, and perhaps some of its staff members, can usually be regarded as "neutrals" in the review of personnel actions such as dismissals which originate in operating agencies. But in most jurisdictions it is the commission itself, or its staff, which has the primary responsibility for job classification and examinations. In practical terms, a grievance appeal involving job classification requires one civil service staff member to sit in judgment on the action of a fellow staff member, or it requires the commission to review the work of its own staff. In either case, there would appear to be considerable pressure for a presumption that the challenged determination is correct. It could be argued, for example, that if the commission does not have sufficient confidence in its staff to support it most if not all of the time, it should get a new staff. Under such circumstances, real impartiality may play havoc with human relations within the commission staff. And when appeals on these subjects are denied, however justifiably, the disappointed grievant will find reason, in the close relationship between reviewer and reviewed, to doubt the impartiality of the procedure.

A simple but drastic solution for this problem has gained wide acceptance. It is to bar any appeals of job classification or examination grievances. Ten of the eighteen large jurisdictions covered by our investigation bar examination appeals, and eight of them bar classification appeals. In defense of this solution, it is sometimes argued that both examinations and job classifications involve highly technical problems on which only the technician is qualified to pass judgment. This argument appears questionable, in view of the large volume of comparable cases regularly handled in private arbitration, presumably with reasonably satisfactory results. The seriousness of the exclusion is shown by the substantial number of appeals involving examinations and classifications which are processed in those states which do not bar them. In Michigan, for example, examination appeals regularly constitute from 12 to 30 per cent of the total, and last year classification appeals were 6 per cent of the total. To bar appeals on subjects of such great concern to employees is to ignore

the problem rather than to solve it.

This examination of adjudication procedures in public employment would be incomplete without a judgment concerning the quality of decisions. Let me preface this judgment with the observation that in private grievance arbitration, the most experienced practitioners seem to be in substantial agreement on some elementary principles, especially on the subject of discipline. For example, most of them would rule that under most circumstances an employee should be informed that a certain act is a punishable offense before he is penalized for committing it. Most of them would hold that the basic purpose of discipline is correction of undesirable conduct rather than retribution. I do not suggest that there is universal agreement on all of the questions that commonly arise in private arbitration; neither do I suggest that arbitrators ignore the unique circumstances of the particular case. I do suggest that the application of many minds to basically similar industrial relations problems has gradually developed a kind of "common law" concerning some of those problems. This development has been criticized by some; but I believe that most of the criticisms are specious, and that both labor and management in private industry find most aspects of this "common law" acceptable.

I have read a great many opinions from a number of governmental jurisdictions, and I have examined the awards of some of those agencies which do not prepare opinions. Some of the opinions and awards appear to be impeccable. In many of the cases, however, it is quite apparent that the adjudicators are dealing with unfamiliar problems, and the results are sometimes highly questionable. Many of these government adjudicators labor in ignorance of the highly pertinent body of thought and experience developed in handling fundamentally similar problems in private arbitration. This is but another manifestation of the isolation of governmental industrial relations from the main body of industrial relations practice and principle.

One solution for some of the problems of grievance adjudication in government which have been discussed here would be for government agencies, especially civil service commissions, to devise ways of making use of experienced industrial arbitrators in such adjudications. While conventional arbitration is not possible in most governmental jurisdictions, there seems to be no reason why experienced arbitrators could not be appointed on an ad hoc basis to render advisory opinions on almost all types of unresolved public employee

grievances. They could be substituted for the full-time staff members now performing this function in some jurisdictions; they could be added to hearing boards such as the one now used in Michigan; and they could serve on the permanent appeal boards such as those now in existence in Connecticut, Massachusetts, New York State, and elsewhere. Parenthetically, I assume that many arbitrators would be willing to devote a reasonable amount of time to such assignments as a public service, despite the sacrifices that would be involved.

The arbitrators would not usually be the mutual choice of the parties to particular disputes, but the impartiality of men and women who are repeatedly chosen by companies and unions in private employment should be above question. This demonstrated impartiality would be particularly advantageous in the handling of classification and examination appeals. While decisions would be subject to review by the civil service commission or other governmental authority in most jurisdictions, the decisions could be of great value in sharpening the issues for consideration. Where the transcript as well as the decision must be reviewed (as in Michigan), the experience of most private arbitrators in conducting informal but orderly and expeditious hearings could help to develop a useable record. Most important, such substantive wisdom as has been developed in private arbitration could be adapted, on a case-by-case basis, to the circumstances of public employment.

It must be realized that most of these benefits would accrue only if the reviewing authorities were willing to give considerable weight to the advisory decisions. Some systems of "advisory arbitration" have broken down because of the rejection of most of the recommendations submitted to the reviewing authority.[17] On the other hand, arbitrators could not expect automatic acceptance of all of their recommendations. What I propose might not work in some situations, but it seems to be worth at least a trial. Experiments of this kind might help to stimulate the overdue reexamination of industrial relations concepts, policies and practices in public employment.

Since the early days of enthusiasm for civil service reform, many people have argued that the government should be a "model employer", or should at least be abreast of the best practices in private

17. For example, an "Impartial Grievance Committee" was established in the 1940's in the New York City transit system. "So little interest did the Board [of Transportation] show in the . . . Committee's recommendations that routine reports asking that employees who had died or left the service be taken off the rolls came back stamped 'denied'." Spero, *op. cit.*, p. 418.

employment. On some matters, particularly fringe benefits, and in some jurisdictions, this policy has been followed. But in the handling of employee grievances, especially in their adjudication, government generally has fallen far behind private industry. There is abundant evidence that the provision of well-defined channels for handling employee grievances and the provision for impartial adjudication of unresolved grievances is an important morale factor in almost any kind of employment. Neutral participation in the final stage of the grievance process helps to induce reasonableness in the earlier stages, and it also helps to insure fair treatment of both employers and employees. It would be a mistake—and in many respects an impossibility—to attempt to transfer to all kinds of public employment all of the procedures and policies of grievance arbitration in private employment; but a great deal of adaptation to the requirements of public employment seems to be both possible and desirable.

COMMERCIAL ARBITRATION IN DENMARK

by Allan Philip

The use of arbitration as a means of solving legal controversies is of considerable importance in Denmark. A great number of statutes of trade associations, cooperative societies and other associations, as well as partnership contracts, contain arbitration clauses. The basic agreement between labor unions and the association of employers has created a very important arbitration tribunal now confirmed by statute.[1] The merchants' guild of Copenhagen has important boards of commercial arbitration and is in addition a member of the arbitration machinery of the International Chamber of Commerce and the guild has formulated arbitration clauses for the use of various trades. Nevertheless, apart from a provision on arbitration clauses in insurance policies and provisions on specific kinds of compulsory arbitration which lie outside the scope of this paper, Danish law contains only one provision relating to arbitration in general, namely an article of the old law-book of 1683[2] enunciating in very general terms the recognition of arbitration agreements and arbitral awards. Based on this provision the Danish courts and to a very limited extent the legal literature[3] has developed a system of law on arbitration. In the following an attempt will be made to describe the more important rules relating to commercial arbitration.

1. Cf. Galenson, The Danish system of labor relations p. 209 et seq.
2. Christian V's Danske Lov 1-6-1. The provision on arbitration in cases between an insurance company and the insured is to be found in the act on insurance agreements no 129 of April 15th 1930 §32.
3. Danish literature on commercial arbitration: Borum, Lovkonflikter 4.ed 1957 p.207; Hjejle, Frivillig Voldgift, 1937, and International Commercial Arbitration, 1956 p.154 et seq.; Hurwitz, Ugeskrift for Retsvæsen 1941 p.109 et seq.; H.Munch-Petersen, Den Danske Retspleje II 1918 p.468 et seq.; Nordic Lawyers' Conference 1928, 1948 and 1957; Kaj Petersen, Udenlandske voldgiftskendelsers anerkendelse og eksekutionskraft, 1935; Philip, American-Danish Private International Law, 1957 p.31; Raffenberg, Internationales Jahrbuch für Schiedsgerichtwesen II p.3 et seq.; Trolle, Juristen 1957 p.178 et seq.

COMMERCIAL ARBITRATION IN DENMARK

1. It is firmly established practice that the parties to a contract may agree that all differences arising between them in relation to that contract shall be submitted to arbitration. If the arbitration clause is formulated so as not to give rise to any doubt the parties may agree to give the arbitrators whatever powers they think fit as long as the contract does not become contrary to public policy. Thus, they may give the arbitrators the right to decide on their own authority, but if the parties have not expressly done so the ordinary courts can decide that the arbitrators have transgressed their authority. And the ordinary courts can never be deprived of the competence to decide whether a valid arbitration agreement has at all come into existence.

Similarly, the parties to a contract which does not contain an arbitration clause may decide to submit an actual difference which has arisen between them to arbitration.

If a party shows that an arbitration agreement exists the ordinary courts will dismiss a law suit and direct the parties to arbitrate, unless of course both parties agree to submit the case to the courts. But the Danish courts are rather rigid in their requirements of proof of the existence of an arbitration agreement. That does not mean that any form is required; it is not even required that the agreement must be made in writing. But the party who insists that an agreement was made must prove that the other party really knew about that agreement and consented to it. This may be illustrated by the following case decided by the Maritime and Commercial Court of Copenhagen:[4]

A produce merchant sold sugar beets to a candy manufacturer. In his letter confirming the sale the produce merchant wrote: "Contract note for sales of feedstuffs", but he did not enclose a copy of this contract note which existed as a printed form. This note contained an arbitration clause providing for arbitration by the board of arbitration of the feedstuffs trade of the Merchants' Guild of Copenhagen. The candy manufacturer objected to arbitration, saying he did not know that an arbitration clause was contained in the contract note. The court held it to be the risk of the produce merchant when selling to a person who did not know the usages of the feedstuffs trade not to have used the printed form or in another way

4. Ugeskrift for Retsvæsen (U.f.R.) 1948.332 SH cf. U.f.R. 1930.85 H and comments by Troels G. Jorgensen Tidskrift for Rettsvitenskap 1931.103. (H:Supreme Court; SH:Maritime and Commercial Court.)

specifically to have informed the candy manufacturer of the consequences of buying on those conditions.

The Danish law concerning the basic validity of an arbitration agreement only applies if the agreement according to Danish rules on conflict of laws is subject to Danish law. The law applicable in deciding the basic validity of an arbitration agreement is chosen in accordance with the rules of conflict of laws on contract.[5]

2. Denmark has ratified both the Geneva protocol of 1923 and the Geneva convention of 1927. On the whole these international agreements have not changed the Danish law as to arbitral awards and the execution of such awards.[6] Arbitral awards are treated in the same way whether they are Danish or foreign and whether they belong to a country adhering to the Geneva conventions or not. The determination of the "nationality" of an arbitral award is therefore without interest with regard to the question whether an award can at all be executed.[7] But as we shall see the validity of an award under the laws of a particular country is of importance when the courts before granting exequatur consider the validity of the award.

One who wishes to enforce an arbitral award must sue on it in the ordinary courts. As a general rule the court will not examine the substance of the case.[8] The extent of its investigations depends upon whether the award must be regarded as Danish or foreign. If the award is foreign, the validity of the award depends upon its "national" law and only the public policy of Danish law will be of importance for the granting of exequatur.

If the award is Danish, Danish law will decide its validity. But in both cases the investigations of the court will be of a very limited character and if the court is satisfied with the validity of the award it will grant a judgment in accordance with the award. This judgment may then be executed in the ordinary way.

The "nationality" of the award need not be the same as that of the arbitration agreement. As a general rule it may be said that the nationality of the award is that of the place of arbitration; but exceptions exist, for example if the place of arbitration is purely accidental and the important connecting factors point to another country.

5. Cf. Philip l.c.p36.
6. Cf. however on a specific point Hjejle, Frivillig Voldgift p 205 et seq.
7. On the advantage of obtaining a foreign arbitral award as opposed to an ordinary judgment with regard to execution in Denmark cf. Philip l.c. p.31. On the American-Danish treaty on friendship, commerce and navigation cf. also l.c.
8. Cf. Danish reservation to the Geneva Convention of 1927.

When the court undertakes to decide whether an arbitral award is valid according to Danish law it will first decide whether the arbitration agreement is valid according to the applicable law, cf. e.g. the case cited below at note 14. It will then consider whether the arbitration tribunal was of a certain impartiality, whether the parties had a possibility of equal representation and, finally, whether basic procedural principles were not violated.

As to the question of impartiality it suffices that there is an impartial umpire. If one party appoints both arbitrators, the other party having been asked to appoint an arbitrator but having failed to do so, the court will accept the arbitration as impartial. But if one party has the right to appoint both arbitrators from the beginning impartiality does not exist.

Similarly both parties must have an opportunity to present their case, orally or in writing, to the arbitrators, but the award is valid even if one of the parties voluntarily declines this opportunity.

The following case[9] decided by the Supreme Court may illustrate the third condition for validity—non-violation of basic procedural principles:

In an arbitration concerning a refrigeration plant the arbitrator, on his own initiative, asked a certified electrician for certain information without informing the parties about it, thus giving them no opportunity to give their opinion on the person chosen or to comment on the information which he supplied to the arbitrator. The court declared the award invalid as the action taken by the arbitrator seriously violated an elementary procedural principle. Furthermore, it was deemed likely that the action of the arbitrator had been of importance in the award.

The award need not include the arbitrator's reasons and no appeal may be taken if the agreement does not permit an appeal. But if the award is defective and if it is obvious that the award is based upon a mistake it will be held invalid. This ground of invalidity is clearly of a very restricted importance.

A case decided by the Maritime and Commercial Court of Copenhagen[10] may illustrate the procedure and requirements with regard to the granting of exequatur to a foreign arbitral award.

A Baltime charter party contained a clause on arbitration in London and provided for appointment of arbitrators and an umpire.

9. U.f.R. 1954.426 H.
10. U.f.R. 1934. 856 SH.

One party, who was a resident of Denmark, did not use his right of appointment and the other party appointed both arbitrators. The latter party then sued the former in Denmark to fulfill his obligations under the award and the defendant objected to the validity of the award. The court held that there was no reason to suppose that the provisions of the English arbitration Act of 1889 on the constitution of the arbitration tribunal had been violated, that the procedure used was not proper or that the tribunal had transgressed its competence. The defendant was then directed to pay in accordance with the award.

Danish law does not require the foreign award be final if it is meant thereby that it should be impossible for the person losing the award to claim invalidity in the ordinary courts.

The public policy of Danish law which must not be violated if the foreign award is to be enforceable in Denmark is probably to a large extent identical with the formal conditions for validity of a Danish award: impartiality, equal opportunity for the parties to present their case, and non-violation of basic procedural principles. The following case[11] although not expressly applying a public policy approach may illustrate this.

Agreement existed on arbitration in Hamburg. One of the parties to the agreement appointed both arbitrators without being able to prove (against the denial of the other party) that he had informed the latter that he wanted arbitrators to be appointed. The arbitrators rendered an award, but similarly the plaintiff was not able to prove that the defendant had had an opportunity, which he had certainly not used, to present the case to the tribunal. The court held the award invalid as according to Danish law. Furthermore, it was not proved that the Hamburg usages were different from Danish law.

3. Numerous private arbitration tribunals exist or are foreseen in Danish commercial contracts.[12] It is a very general practice in Danish agreements on commercial arbitration to provide that the umpire shall be the president or the vice president of the Maritime and Commercial Court of Copenhagen or that he shall be appointed by one of them. This court, created in 1861, has jurisdiction in commercial and maritime matters where a court of Copenhagen is com-

11. U.f.R. 1910.420.
12. An agreement between the Danish Chamber of Industry (Industriradet) and Deutscher Industrie- und Handelstag of 1924 on arbitration has never been applied and no connection between the two organizations exists today, cf. Internationales Jahrbuch für Schiedsgerichtwesen I p.250 and III p.314.

petent, but its jurisdiction may also be invoked by agreement between the parties when courts in other parts of the country are competent, and it has been made competent by statute in a number of other matters relating to commercial life. Appeal lies from it directly to the Supreme Court. The court is presided over by the president or the vice president who both are lawyers but apart from them the court consists of lay persons with important commercial or maritime experience and it enjoys great confidence, which accounts for the important position of its presidency in private arbitration. Although it has all the characteristics of an ordinary state court it may be said to function to some extent as an arbitration tribunal, especially because of its very frequent attempts at conciliation between litigating parties.[13]

4. The Committee of the Merchants' Guild of Copenhagen plays an important role in Danish commercial law.

By Royal Decree of April 23, 1817, the Committee has been charged with giving opinions for the use of the courts and the authorities on commercial usages in the various trades. According to the statute on purchase and sale of movables of 1906 §1 such special usages when they exist replace and supplement the rules of that statute, and the opinions of the Committee therefore almost have the character of binding law and are printed alongside with the cases in the law reports.

In 1883 the committee created an arbitration institution which has become of considerable importance. Beside a general arbitration tribunal special tribunals exist for the trade in groceries, butter, coffee, iron and metal, seeds, feedstuffs and meal. Although the rules of these tribunals are not exactly alike very great similarity exist between them. In the following an account of the general principles governing these rules are given.

The rules provide for the election by the Committee or the members of the Guild of a number of persons to function as arbitrators. In most of the tribunals three members participate in cases on quality of goods and five members in other cases; but some of the rules provide that if unanimity among five members cannot be obtained two more members shall be called on; decision is then taken by a majority vote.

13. Danish courts according to the act on procedure §268 have a duty to try conciliation between litigating parties if they see a reasonable possibility for conciliation.

Most of the tribunals function when the parties to a contract have agreed to refer differences to the tribunal either in the contract or by later agreement. Two of the tribunals, however, only function in cases in which the contract note of the Merchants' Guild for that specific trade has been applied.

All of the rules provide for written pleadings and give the tribunal the right to ask for further information and documents. They further contain a number of detailed procedural rules.

The tribunals have the right to dismiss a case if they find that it is unsuitable for decision by arbitration or if procedural rules are not followed. If time limits for written pleadings to be delivered are not observed the tribunal may proceed to give its award.

The tribunals may, but need not, give reasons for their awards, not even where an appeal has been instituted, namely in the feedstuffs trade.

Several of the rules contain provisions on the taking of samples and specific rules on the procedure for judging the quality of goods.

According to all the rules the parties must accept the award of the tribunal as final and binding. The rules on arbitration in the feedstuffs trade go very far in this respect, saying that the award is binding with regard to substance as well as to form and can not be set aside by the ordinary courts. As the awards of these tribunals are executed in the same way as other arbitration awards this provision does of course not exclude the courts from examining these awards to the same extent as other awards. But because of the respect which these tribunals enjoy their awards will rarely be set aside. In a recent case before the Maritime and Commercial Court of Copenhagen[14] an award by the arbitration tribunal of the feedstuffs trade was, however, set aside because the defendant was found not to have agreed to arbitration in circumstances similar to those referred above at note 4.

The rules contain a provision putting special pressure on parties to an arbitration to fulfill their obligations according to the award. If a person does not fulfill his obligations his name will be advertised on the black board of the Guild. As long as his name is on the black board the tribunal will not try any case to which he is a party if the contract at the basis of such a case has been concluded after the advertisement of his name.

14. U.f.R. 1955.1081 SH.

THE PRACTICE OF COMMERCIAL ARBITRATION IN INDIA

by G. L. Bansal

Arbitration—the process by which persons settle their differences and disputes by reference to judges of their own choice—is perhaps among the earliest of mankind's efforts in search of peace and justice. Long before Courts of Law were organized or judges had formulated the principles of law, men had resorted to arbitration for the adjustment of differences and the settlement of disputes. In the commercial sphere, arbitration has meant the process by which businessmen submit disputes which arise out of their business transactions to one or more persons whom the parties selected to decide a particular case. It is a substitute for court litigation. The rapid and extensive development of the modern practice is due to many factors. One is the condition which surrounds court litigation. The long delays and heavy costs involved made people, especially businessmen, prefer this form of settlement. Another factor which encouraged the use of arbitration has been the enactment of arbitration laws by different countries, recognizing it as a semi-judicial process, with the right to enforce the award in a court of law. In India also, arbitration is a recognized method of settling commercial disputes. The more important of the Chambers of Commerce in this country have organized arbitration tribunals which may be used to settle disputes arising between their members, between their members and non-members, or even by outsiders. The establishment of such tribunals has, however, taken place in accordance with the varying conditions obtaining in particular branches of trade or in particular regions. In the following paragraphs is given a brief description of the existing arbitration facilities,

i.e. of the machinery and its operation. The gaps in the arbitration scheme and the lines along which better use may be made of the arbitration facilities in the settlement of commercial disputes are also indicated.

Before familarizing oneself with a brief description of the existing arbitration facilities, it would be better to start with a rough idea about the legislation governing arbitration in this country. The Indian Arbitration Act, 1940, regulates arbitration and recognizes arbitration as a valid method of settling disputes. Parties can agree in written form to submit present or future differences to arbitration whether the arbitrators are named therein or not. They can also agree to refer disputes to arbitrators to be appointed by a party designated in the agreement. A Court of Law can interfere with the selection of arbitrators only:—

(a) Where an agreement provides that the reference shall be to arbitrators appointed by the consent of parties and difference has arisen between them;

(b) If any appointed arbitrator or umpire neglects his duty or is incapable of acting and the arbitration agreement does not show the mode by which he is to be replaced.

A court of law may also remove an arbitrator if he has misconducted himself or the proceedings. An award can be enforced in a court of law having jurisdiction and a court of law generally pronounces judgment in terms of an award unless the court modifies or remits the award under certain circumstances. Thus under the Indian arbitration law an award is more or less final.

Arbitration facilities available in this country for the settlement of disputes may be broadly classified as—

(a) arbitration tribunals dealing with disputes arising in certain specific commodities; and

(b) tribunals dealing in a general way with all types of disputes.

By and large, it is the arbitration machinery dealing with cases arising in particular commodities and branches of trade that has developed and is working quite successfully. The arbitration tribunal under the East India Cotton Association, Ltd., Bombay, is a recognized agency for settling disputes in raw cotton. The arbitration facilities offered by the Bengal Chamber of Commerce, Calcutta, are

extensively used in the settlement of disputes arising out of jute goods, apart from being utilized for settling disputes of a general nature. The Bombay Millowners' Association has recently established arbitration facilities to settle disputes arising out of contracts in cotton textiles. The Grain and Oilseeds Merchants' Association, Bombay, offers facilities for the settlement of disputes arising out of oilseeds. The Indian Produce Association, Calcutta, arbitrates in disputes arising out of grains and oilseeds and other general produce. In addition, the arbitration machinery under the Bombay Oilseeds Exchange, Ltd., Bombay, the Bombay Bullion Association, Bombay, Calcutta Bullion Association, and many other commodity exchanges are availed of by their members in the settlement of their disputes. In fact, one of the conditions for being a member of such Exchanges is that all disputes arising out of their contracts will be settled by arbitration. Thus, very satisfactory arbitration facilities exist in respect of disputes arising in certain commodities like jute goods, raw cotton, cotton textiles, oilseeds, etc.

These arbitration tribunals generally specialize in the settlement of disputes arising in certain commodities and are mostly resorted to by their members in settlement of disputes among themselves, and between them and non-members. Outsiders can avail themselves of the facilities but that is not usually done. Apart from these specialized arbitration facilities, arbitration tribunals, empowered to deal with all types of disputes in case a reference is made to them, are established under the auspices of the more important Chambers of Commerce in the country, particularly those located at the ports. In fact, all important Chambers of Commerce, like the Indian Merchants' Chamber, Bombay, the Indian Chamber of Commerce, Calcutta, The Bengal Chamber of Commerce, The Bombay Chamber of Commerce, The Madras Chamber of Commerce, The Southern India Chamber of Commerce, The Western India Chamber of Commerce, Bombay, the Bharat Chamber of Commerce, Calcutta, the Merchants' Chamber of U.P., and many others have arbitration tribunals under their auspices.

The procedures adopted for the selection of arbitrators are mainly two—

(a) Where the arbitration tribunal itself nominates an arbitrator or arbitrators on a reference being made by either of the parties;

(b) Where the parties select arbitrators from a panel of arbitrators prepared by the tribunal; the arbitrators themselves selecting an umpire of the tribunal nominating one in case there is no agreement.

The rules of the Bengal Chamber of Commerce provide for the arbitration tribunal of that Chamber to nominate the arbitrators. The Bombay Chamber of Commerce, Bengal National Chamber of Commerce, Calcutta, Bharat Chamber, Calcutta, Indian Produce Association, Calcutta, have similar provisions. But the most extensively used method of selection of arbitrators is for the parties to select from a panel prepared by the commercial organization which administers arbitration proceedings. Most of the tribunals dealing with arbitration in particular commodities provide for this type of selection. The East India Cotton Association, Ltd., Western India Chamber of Commerce, Bombay, Grain and Oilseeds Merchants Association, Bombay, the Millowners' Association, Bombay, the Indian Chamber of Commerce, Calcutta, the Indian Merchants' Chamber, Bombay, and many others have adopted this method of selection of arbitrators. This method of selection is of advantage in that the parties, having a choice in the selection of arbitrators, have more confidence in the machinery.

Most of the Chambers have arbitration tribunals and there are excellent arrangements for the settlement of disputes. In the case of tribunals specializing in disputes arising in certain commodities, the facilities are extensively used, as they are in the case of commodity exchanges. The main reasons are that these associations are well organized and members of these associations insert arbitration clauses in all their contracts. Thus, necessarily, all disputes arising will have to be settled by arbitration. But the same cannot be said of arbitration facilities of a general nature. The insertion of a standard clause of arbitration in all contracts is only slowly gaining popularity.

While thus, as a result of voluntary effort on the part of commercial bodies, facilities for commercial arbitration are provided in the case of local disputes, facilities for adjudicating disputes arising in the course of overseas trade are not present to the same extent. Excepting in the case of certain commodities like jute goods, raw cotton, cotton piecegoods, hides and skins, oilseeds and pepper, the arbitration clause generally inserted is that of a foreign tribunal. The reason is partly historical. Another reason is that foreign buyers of these commodities are generally better organized than the Indian

sellers. They have their own arbitration tribunals, mostly situated in London, and all disputes arising out of the contracts for the export of such commodities are settled by arbitration in London. Although Indian parties receive notice before arbitration proceedings are instituted and are requested to present their case, the expenses and the difficulties involved prevent them from presenting their case before the foreign tribunals and thus their case is mostly lost by default. Another difficulty is in the differences in standards. Survey certificates issued by the Indian Chambers of Commerce are not generally accepted by these foreign tribunals and they get the commodities surveyed by their own surveyors and, in case of differences, the reports of foreign surveyors are relied upon. Without in any way questioning the impartiality of these foreign tribunals, it must be mentioned that there is widespread dissatisfaction among the Indian parties, mostly because the point of view of the buyers in foreign countries are more ably represented and the Indian parties themselves have many difficulties in presenting their cases effectively. Similarly, in the case of Indian import trade, the arbitration clauses generally inserted are those of foreign arbitration tribunals. The difficulties of presenting the case of Indian parties effectively before these foreign tribunals is a handicap which prevents their obtaining justice. Thus, while in the case of local disputes the arbitration facilities are sufficient, there is complete dearth of arbitration tribunals situated in India to adjudicate disputes arising out of foreign trade.

Complaints regarding non-fulfillment of contractual obligations by Indian as well as by foreign parties are frequent. Such complaints arise mostly in cases where there is no arbitration clause in the trade contracts. Further, some of the grievances of Indian parties can be met only by the establishment of suitable arbitration facilities in this country. This is possible in the case of a large number of our staple exports. To some extent, the insertion of the arbitration clause of a foreign tribunal is mostly the result of custom and tradition; to some extent it is because Indian exporters are unorganized. The formation of well-knit organizations by the exporters, the establishment of a suitable arbitration machinery and the insertion of the arbitration clause of such tribunals in all sales contracts are the chief remedies in the case of Indian exports.

Another gap is the absence of a central organization for commercial arbitration. In the United Kingdom, the Court of Arbitration of the London Chamber of Commerce occupies a central position.

In the United States, the American Arbitration Association is a central organization. In Canada, the Arbitration Tribunal of the Canadian Chamber of Commerce similarly occupies a predominant place. In India, while there are well-developed arbitration facilities at the ports, there has been no central organization whose arbitration facilities can be made available at all the ports and whose operation gives the foreign and Indian parties a degree of confidence. This aspect of the question has been engaging the attention of the commercial community and of the Government of India for some time. Realizing the advantages of such central arbitration facilities being made available on a voluntary basis, the Federation of Indian Chambers of Commerce and Industry has set up an arbitration tribunal which offers extensive arbitration facilities. A sub-committee of four nominated by the Federation with powers to co-opt 17 additional persons forms the Arbitration Sub-Committee responsible for the administration and work of the Tribunal. The sub-committee draws up the list of arbitrators on the basis of recommendations made by commercial organizations in India and by other foreign bodies with which the Federation has or may enter into joint arbitration agreements. Arbitration can be held anywhere in India and the panel of arbitrators covers almost all important industrial and trade interests. The sub-committee may add additional names to the list or delete the name of any person. The broad composition of the sub-committee and the method of constituting the panel of arbitrators is such that the tribunal in its actual operation can adjust to differing needs and requirements.

In accordance with its objective of settling disputes arising in the course of our international trade in an amicable manner, the Federation has entered into joint arbitration agreements with central arbitration associations of other countries. The joint agreement arrived at with the American Arbitration Association provides that a dispute arising out of a contract in which the joint arbitration clause is inserted should be settled by arbitration. If the arbitration is to be held in India, the dispute is to be submitted to the tribunal of the Federation and settled in accordance with its rules. If the arbitration is to be held in the United States, it will be conducted in accordance with the rules of the American Arbitration Association. In case of disagreement on the place of arbitration, a Joint Arbitration Committee consisting of three members—one appointed by the Federation, another by the American Arbitration Association and the

third, the Chairman, to be chosen by the two other members and to be of a nationality other than that of the parties—will decide the locale. A more or less similar agreement has been arrived at with the Japanese Commercial Arbitration Association. Both the Federation's Tribunal and the Japanese Commercial Arbitration Association have agreed to establish and maintain international panels of arbitrators to carry out the purpose of the agreement, i.e., to cooperate in promoting the use of arbitration in the settlement of commercial disputes.

It is, however, a matter for regret that in spite of adequate facilities now available, trade complaints continue to cause bitterness in international trade relations. In so far as the parties are not aware of the existence of the arbitration facilities, a concerted publicity campaign to popularize commercial arbitration is highly desirable. Apart from this, persuasion may also play a useful role. It is time that organizations interested in the increasing use of arbitration in the settlement of commercial disputes and thereby creating better understanding and amity in international commercial relationships give thought to these aspects.

FOREIGN TRADE ARBITRATION IN AMERICAN COURTS

Two Annotated Cases

Interesting questions on the application of French arbitration law under a contract executed in France arose recently in the federal courts of Virginia.

On April 26, 1952 a French corporation, La Societe Navale Caennaise, had entered into a contract in Paris with a Delaware corporation, Reynolds Jamaica Mines, Ltd., for the sale of a ship then named the *Astree* and later re-named the *Dragon*. In an additional contract of May 26, 1952 the American corporation designated a Panama corporation, Carribean Steamship Company, as the purchaser, but remained responsible for the proper execution of the contract and the payment of the purchase price. Both the American and Panamanian corporations are wholly-owned subsidiaries of Reynolds Metals Co. Shortly after the delivery, on June 29, 1952, of the ship in Rouen, engine trouble developed on the voyage to British West Indies. It was repaired in Mobile, Alabama at a cost of nearly $30,000.

On December 8, 1952 a law suit, based on breach of contract and misrepresentation as to the condition of the ship was instituted by Mines and Carribean for recovery of these losses. The case was dismissed for lack of jurisdiction, since the purchase contract contained an arbitration provision[1] which provided for arbitration before a single arbitrator in London, of all disputes or differences which may arise in connection with the fulfillment or interpretation of the contract. The contract further provided that the right of each party to request arbitration would automatically cease after 30 days from the delivery.

The French corporation invoked this arbitration provision as a

1. Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise, 140 Federal Supplement 16 (U.S. District Court E.D. Virginia, Newport News Division, April 12, 1956).

defense, barring any ordinary court procedure. Raising it belatedly in the court proceedings was not considered a waiver of the arbitration provision since, as the Circuit Court said, "Mines was not prevented from having resorted to arbitration, nor otherwise unduly burdened, by any delay attributed to S.N.C."[2] The defense, that is, the reference to arbitration, appeared permissible both under French law, applicable to a contract executed in France,[3] and under American law, the lex fori, namely article 3 of the Federal Arbitration Act[4] which provides for a stay of a court action in international trade matters. Said the Circuit Court: "A contract made by an American corporation with a foreign one, upon which it remains liable, and of which it is in fact both an essential party and the real beneficiary involves commerce with a foreign country."

The principal question which arose in the lawsuit was the effect of the arbitration clause: whether it prevented a court action based on articles 1641 and 1643 of the French Civil Code, namely on the contractual liability arising out of fraud in the withholding of knowledge of hidden defects. Under French law, applicable to a contract executed in Paris, arbitration clauses are valid (art. 1003 Code of Civil Procedure; art. 631 as amended, Code of Commerce) and must be respected and law courts therefore have no jurisdiction to determine questions which, under the agreement of the parties, must be submitted to arbitration. The District Court mentioned French court decisions to that effect[5] which had been presented in affidavits of the French experts, Me. Paul Govare, of Paris, and Lucien Le Lievre, Esq., of New York, necessary for the proof of foreign law which, under American concept, is a fact to be proven to the court.[6] Said the District Court, quoting from a decision of the Supreme Court of the United States:[7] "Statutes and decisions having been

2. The District Court distinguished Radiator Specialty Co. v. Cannon Mills, 97 F. 2d 318 (Fourth Circuit) and American Locomotive Co. v. Chemical Research Corp., 171 F. 2d 115 (Sixth Cir.), where undue delay on the part of the party seeking arbitration was considered a "default" in proceeding with arbitration and thereby a waiver.
3. Cp. recently Trib. civ. Seine (1er Ch.), 7 Juin 1956, 45 Revue Critique de Droit Internationale 683 (1956), with note Henri Battifol p. 687.
4. 61 Stat. 669 (1947).
5. Beugnigi v. Darmouni, Cass. Feb. 27, 1939, Gaz Pal. 1939-1-678; Compagnie d'Assurance Alsacienne v. Lamiot, Cass. Jan. 22, 1946, Gaz Pal. 1946-1-134 and Dalloz 1946, 239.
6. Cp. recently Domke, Expert Testimony in Proof of Foreign Law in American Courts, New York Law Journal, vol. 137 No. 48 and 49, p. 4 col. 1 (March 12 and 13, 1957).
7. Finney v. Guy, 189 U.S. 335.

proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions."

Once the validity of the arbitration clause is established under French law, its application by American courts may no longer be doubted. However, plaintiff raised the point that a cause of action based on fraud in the inducement of the contract is not controlled by the arbitration clause. The latter, in spite of its broad wording, would hardly include fraud in inducing the contract. Moreover, fraud, as asserted, would destroy the contract and thus have the effect of nullifying the arbitration clause, as part of the contractual agreement. But the District Court found that under article 1643 of the French Civil Code the effect of any alleged fraud would only obligate the seller to pay damages but would not have the effect of nullifying the contract or any part of it. Plaintiff had retained the ship, had never tried to rescind the contract, or tender the ship to the French seller with the demand for return of the purchase price. Plaintiff itself had instituted a court action on this very contract, for failure of the full performance of the obligations of the seller. In this respect, the District Court said: "Assuming arguendo that there was fraud in the inducement the purchaser had an election of remedies. 'Mines' could disaffirm the contract, return the property, demand the return of the purchase price, and thus free itself of the arbitration clause. It could retain the property, accept its benefits, affirm the contract, and sue for damages for fraud and deceit, in which event 'Mines' ratifies the contract and is bound by the arbitration agreement. In this country it is generally recognized that an action by way of affirmance of the contract is a bar to the right to rescind . . . One who affirms a contract acknowledges that he entered into the same and is bound by all of its provisions."

Arbitration, never invoked as a remedy by either party but only advanced by the French corporation as a defense against the court action, could be requested under the express agreement of the parties only within 30 days from the delivery of the ship. The parties thereby had limited their right to arbitration to a definite period. The French corporation stated that arbitration was the sole remedy which the buyer had available for the adjustment of the controversy, and not having availed itself of it within the time specified in the

contract, could not seek relief in a court action. With that assertion both the District and Circuit Courts agreed.

However, the question arose as to whether under French law, this time limit was reasonable. Referring to the decision of the Court of Appeals of Montpellier of November 9, 1954,[8] the District Court interpreted French law to the effect that a thirty day provision in an arbitration clause as a time limit is not unreasonable, all the more so as there was not substantial disagreement at this point among the experts on French law. Said the Circuit Court: "The agreement reasonably construed means that unless a dispute of this character arose within thirty days of delivery, and arbitration was sought within the same time, the parties were to be left where they found themselves. To hold otherwise would be for us to rewrite the contract without power to renegotiate its terms."

The complaint was therefore dismissed and the Circuit Court unanimously affirmed the decision "sustaining as matter of law the defense based on the arbitration provisions of the contract."[9] The decision of both federal courts make it evident again that the agreement of the parties on a specific method of settling future disputes by arbitration will be honored by the courts.

Martin Domke

The American Rail and Steel Case

On June 9, 1955 the New York Court of Appeals decided the case of *American Rail and Steel V. India Supply Mission,* 308 N.Y. 577, 127 N.E. 2d 562. In reversing the Appellate Division the Court rendered a decision notable for its effect on incorporation by reference of contract terms under the law of New York and a decision of particular interest to those in the field of international commerce.

The Indian government in 1948 ordered $750,000.00 worth of first quality relaying rails suitable for use in continuous track from the American Rail and Steel Co. In June 1951 the India Supply Mission, having received a report from the engineer in charge of the Kandla Deesa Construction in India that the rails had been sorted and were found to be 61.6 percent unserviceable, wrote to the Presi-

8. Gazette du Palais, February 3 and 4, 1955. Cp. also Mossesson v. Feldaun, Rennes, February 13, 1935, Dalloz Per. 1937-2-12.
9. 239 F. 2d 694.

dent of American Rail and Steel to ask for his "solution to this unhappy situation."

As negotiation proved futile, the solution was sought in legal action. In order to provide the American firm with a forum the India Supply Mission had included in its contract form 826 the following standard arbitration clause:

> "25. ARBITRATION: All questions and controversies arising in connection with this contract shall be submitted to arbitration in New York, New York in accordance with the rules of the American Arbitration Association."

Paradoxically it was the India Supply Mission which sought to rely on the arbitration provision. The controversy centered about the sufficiency of the following paragraph located prominently on the face of the sales contract to incorporate by reference the arbitration provision which was contained in a separate form.

> "The contract is placed in accordance with conditions of contract Form ISM 826 Rev. copy attached and can be modified or supplemented only in writing and signed by both parties hereto."

A copy of contract Form ISM 826 was not in fact attached so the case concerned itself with the validity of the incorporation despite the omission.

The Court of Appeals, in deciding that the reference was not sufficient to incorporate the arbitration clause, was confronted with the problem of deciding the effect of conflicting precedents set by two prior decisions. A broader consideration which that court seems altogether to have ignored was the effect its decisions might have on international commerce.

Among the possible avenues for settlement of controversies between private American corporations and foreign sovereignties such as the Indian Government are:

1) Action in India under the laws of India.
2) Action in the United States under the laws of the United States or one of its states.
3) Arbitration.

The first possibility (i.e. action in India) is no possibility at all for an American firm. Attachment of the Indian government in order to satisfy a claim against it would be almost impossible. The ability of a private American corporation to attach the assets of a

sovereign nation for purposes of jurisdiction or in satisfaction of a judgment is presently much in doubt.

Prior to 1952 the United States Department of State supported the absolute theory of sovereign immunity. This meant that a sovereignty could not without its consent be made respondent in the courts of another sovereignty. However in 1952 the Tate Letter was issued. In it the Department of State recognized the widespread and increasing practice on the part of governments of engaging in commercial activities and tried to make available to persons doing business with governments an opportunity to have their rights determined in the courts, 26 Dept. State Bulletin 984,985 (1952). It proposed to do this by thereafter following the restrictive theory of sovereign immunity. This theory recognizes sovereign immunity only in public acts (jure imperii) and not in respect to private acts (jure gestionis). A new dimension was added in a decision of the District Court of the Second Circuit where it was held that in spite of the Department of State's favorable attitude toward restricted immunity the court cannot exercise *jurisdiction* by seizure and detention of property of a friendly sovereignty, *New York and Cuba Mail Steamship Co., owner of S.S. Virginia City Victory v. Republic of Korea,* 132 F. Supp. 684 (1955). In that case the Department of State had entered suggestions on behalf of immunity from seizure of Korean property.

The court felt it was not necessary, under the circumstances, for it to decide 1) whether the Republic of Korea was otherwise immune from suit even under the restrictive theory (i.e. was the act of buying rice to feed a starving population during wartime governmental or commercial) and 2) whether the Republic of Korea may contest a State Department ruling on immunity from suit. It might be argued that the restrictive theory of immunity to suit is illusory because 1) in many instances jurisdiction may be acquired only by the attachment of property by the filing of suit; 2) we do not know whether an act is commercial or governmental; and 3) we do not know the validity of State Department recommendations.

Arbitration provides a forum for the American businessman. A sovereignty which offers in its contracts to settle controversies through arbitration is not likely to improve its position in the world market by deliberately retreating behind sovereign immunity to avoid the arbitration or the execution of an arbitration award.

The expanding business economy which finds its hub in New York City, but which radiates to every corner of the globe, each day

re-emphasizes the need for a simple expeditious method for complete and final settlement of controversies. The New York Courts through the thirty years preceding the *American Rail and Steel Case* had promoted the practice of arbitration. The foundation of this policy was a healthy respect for the expressed intentions of the parties to an agreement (cf. *Matter of Wenger v. Propper Silk Hosiery Mills,* 239 N.Y. 199, 146 N.E. 203 (1924). "When parties have selected their tribunal the courts ought not to interfere unless very substantial reasons are shown.") The New York Courts have also recognized that arbitration through its efficient and economical operation, a minimum of delay and a maximum of flexibility, provides a generally useful solution for many otherwise difficult problems. *Matter of Feuer Transportation,* 295 N.Y. 87, 65 N.E. 2d 179 (1946).

The Court of Appeals fashioned the contract law on which it based the decision in *American Rail and Steel Co. v. India Supply Mission* chiefly out of two conflicting precedents. The first of these was that set in *Level Export Corp. v. Wolz, Aiken & Co.,* 305 N.Y. 82, 111 N.E. 2d 218 (1953), in which a sales contract contained the following paragraph:

> "This salesnote is subject to the provisions of Standard Cotton Textile Salesnote which by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller. No variation therefrom shall be valid unless accepted in writing."

An arbitration clause contained in the referred-to Standard Cotton Textile Salesnote was held by the Court to be validly incorporated by the above clause.

The other precedent was set in the case of *Riverdale Fabrics Corp. v. Tillinghast Stiles Corp.,* 306 N.Y. 288, 118 N.E. 2d 104 (1954), in which a sales contract contained the following sentence:

> "This contract is also subject to the Cotton Yarn Rules of 1938 as amended."

Without at all disapproving their decision in the *Level Case,* the Court held that the clause in this sales contract was not legally sufficient to incorporate by reference an arbitration provision in the referred-to Cotton Yarn Rules.

The primary concern of the Court in interpreting any contract involving an arbitration provision is that a party to the contract not

be compelled to give up his right to have controversies arising out of the contract determined in a court of law, when the contract does not clearly indicate that the parties intended to arbitrate. As the Court in the *Riverdale Case* said, "The intent must be clear to render arbitration the exclusive remedy; parties are not to be led into arbitration unwittingly through subtlety." It is with this, the primary concern of the Court, that one must approach an evaluation of the Court's decision in the *American Rail and Steel Case*. In such an evaluation it is also necessary to consider the application by the Court of settled contract doctrine to the contract at hand. The Court applied settled contract doctrine in such an unfortunate way that the arbitration provided for in the contract was denied, although neither of the parties was "led into arbitration unwittingly through subtlety." The precedent of the *Riverdale Case* neither demanded nor warranted the holding of the incorporating clause in the *American Rail and Steel* contract insufficient. Rather a contrary holding would appear to be demanded by the Court's decision in the *Level Case*.

There is no question that "when a writing refers to another document, that document, or so much of it that is referred to, is to be interpreted as part of the writing." (Williston on Contracts, Sec. 628) It is also clear that a party accepting a written contract is bound by the stipulations and conditions expressed in it whether he reads them or not. In the absence of fraud in the execution of the contract, and there was no allegation of fraud in the contract under consideration, he who signs or accepts a written contract is conclusively presumed to know its contents and assent to them. (*Metzger v. Aetna Insurance Co.,* 227 N.Y. 411, 125 NE 814) It is further settled that the standard used in interpreting a contract is "the meaning that would be attached to the integration (contract) by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration . . ." (A.L.I. Restatement of Contracts, Sec. 230). In effect the Court, in holding the incorporating clause in the *Level Case* sufficient and the clause in the *Riverdale Case* insufficient to incorporate by reference the arbitration provision, was deciding that this is the way a reasonably intelligent person would understand the words used. An examination of the language and circumstances in the *Level* and *Riverdale* cases indicates that this was not an inappropriate holding.

In the *Level Case* the words themselves could not show more clearly an intent to incorporate the provisions of the Standard Cotton Textile Salesnote. Furthermore, the incorporating clause was prominently placed on the face of the contract. The party seeking to avoid arbitration in the *Level Case* argued that not all the provisions of the Standard Cotton Textile Salesnote were intended to apply. The Court there found that there was no attempt made to limit the application of the Salesnote, but that rather a contrary intention was indicated by the statement that "no variation therefrom (from the Salesnote) shall be valid unless accepted in writing."

In the *Riverdale Case,* on the other hand, the words used did not so emphatically state that all the provisions of the Cotton Yarn Rules of 1938 as amended were to become part of the contract. Furthermore, the incorporating clause, rather than being prominent, was in fine print. The clause contained no language concerning the requirement of a writing to vary any of the terms. The lack of such language permitted the Court to find that some of the provisions of the Cotton Yarn Rules were not intended to apply. In the *Riverdale Case* the Court decided that the Cotton Yarn Rules were intended to apply only so far as sales were concerned and were not intended to require arbitration of disputes arising under the contract. In that case, in order to achieve an equitable result, the Court extended itself to the very limits of what might be considered a logical interpretation of the language used. It should not have extended itself still further than the limits imposed by logical interpretation in the *American Rail and Steel Case* in order to reach an inequitable result.

The incorporating clause in the *American Rail and Steel* contract, like the incorporating clause in *Level,* left absolutely no doubt that the provisions of I.S.M. Form 826 were to be part of the contract under any reasonable interpretation of the words used. The incorporating clause, like the clause in *Level,* was prominantly placed on the face of the contract. Perhaps most important, the clause here contained the statement that the conditions in I.S.M. Form 826 could "be modified or supplemented only in writing and signed by both parties hereto." It was this provision in the *Level Case* which the Court determined left no doubt that all of the provisions of the incorporated form were intended to apply, including the arbitration provisions. Nevertheless, the Court in the *American Rail and Steel Case* did hold that the arbitration provision was not validly incorporated into the sales contract. The result is that there are now two

cases decided by the Court of Appeals of New York with essentially the same facts, yet contrary holdings. Although the state of the law was somewhat indefinite when only the *Level Case* and the *Riverdale Case* were on the books, now with the addition of the decision in the *American Rail and Steel Case* the law on the subject is completely incomprehensible. In order to incorporate an arbitration provision by reference today it is necessary to copy word for word the language of the incorporating clause in the *Level Export Case*.[1] This state of the law is a regrettable throwback to the unnecessary formalism which defeated the satisfaction of the just claims of many litigants in an earlier period of the law. In this small area of contract law the standard of the reasonably intelligent person no longer applies; the standard has become the accuracy with which a prescribed formula has been followed.

There is no telling what other provisions of a contract the Court might come to consider of sufficient sanctity to require the formalistic treatment for incorporation by reference that they have extended to arbitration provisions. By reversing the lower court's decisions the Court of Appeals not only unsettled the many existing contracts which attempt to incorporate arbitration provisions by reference and rendered uncertain the entire law of incorporation by reference but also unsettled other nations' faith in American jurisprudence and the predictability of American law.

Lewis J. Mendelson and Daren A. Rathkopf

1. A word of caution to the draftsman: Inasmuch as the court has come so close to overruling the decision in the *Level Export Case* there is a strong possibility that the next case will explicitly overturn it. An abundance of caution would require that any arbitration provisions be put into the body of the contract.

READINGS IN ARBITRATION

Articles and Notes in Legal Periodicals

Arbitration as Affecting the Appraisal Provisions of the Standard Fire Insurance Policy. By H. N. Smith, 21 Queens Bar Bulletin 19 (1957).

Arbitration Agreement in Collective Contract given Liberal Construction [*Matter of Potoker,* 2 *N.Y. 2d* 553], 9 Syracuse L. Rev. 107-109 (1957).

Arbitration Awards Vacated for Disqualification of an Arbitrator, 9 Syracuse L. Rev. 56-64 (1957).

Arbitration: Discharge for a Criminal Act: Question of Proof [*Rheem Automotive Co.,* 27 *Lab. Arb.* 863], 5 Un. Cal. Los Angeles L. Rev. 345-349 (1958).

Arbitration under the Family Protection Plan. By R. Newell Lusby, 29 N.Y. State Bar Bulletin 397-403 (1957).

Arbitration Law in California: Private Tribunals for Private Government. By Eddy S. Feldman, 30 So. Cal.L.Rev. 375-500 (1957).

Bar, Bench & Table: An Arbitral Drama. By Alfred B. Carb and Albert I. Edelman, 13 The Business Lawyer 27-51 (1957); also published by AAA, 42 p. (1957).

Compulsory Arbitration in Pennsylvania—Its Scope, Effect, Application and Limitations in Montgomery and Delaware Counties—A Survey ana Analysis. By Anthony L. Bartolini and Anthony L. V. Picciotti, 2 Villanova L.Rev. 529-542 (1957).

Constitutionality of Arbitration Statutes [*Re Smith,* 381 *Pa.* 223, *appeal dismissed* 350 *U.S.* 858], 55 ALR 2d 432 (1957).

Death of a Party to a Common-Law Submission Agreement Revokes the Arbitrator's Power to make an Award [King v. Beale, 96 S.E. 2d 765], 43 Virginia L.Rev. 789-791 (1957).

An Evaluation of Labor Arbitration. By Beryl Harold Levy, 8 Labor Law Journal 529-530, 571 (1957).

Federal Enforcement of Agreements to Arbitrate New Contract Terms, 52 Northwestern Un.L.Rev. 284-294 (1957).

Fifty Years of Grievance Arbitration: The Anthracite Experience. By Stanley Young, 8 Labor Law Journal 705-713 (1957).

Florida Arbitration Law. By A. Dallas Albritton, Jr., 31 Florida Bar Journal 121-128 (1957).

The General Case for Arbitration. By Bernard Arbuse, 31 Florida Bar Journal 129-132 (1957).

Grievance Arbitration in the Railroad Industry. By Jacob J. Kaufman, 9 Labor Law Journal 244-247 (1958).

Invocation of Fifth Amendment held not "Proper Cause" for Discharge by Labor Arbitrator [*Republic Steel Corp.*, 28 *Lab.Arb.* 810], 71 Harv.L.Rev. 736-738 (1957).

Judicial Review of Arbitral Awards—Common Law Confusion and Statutory Clarification. By Francis E. Jones, Jr., 31 Southern Cal.L.Rev. 1-37 (1957).

Labor Arbitration and Stare Decisis. By Francis E. Jones, Jr., 4 Un. Cal.Los Angeles L.Rev. 657-661 (1957).

Maritime Arbitration. By Charles Maechling, Jr., 44 Marine News (New York) No. 5, 14-15, 42-43 (1957).

The Proper Uses of Arbitration. By Harold W. Davey, 9 Labor Law Journal 119-126 (1958).

The Proposed Uniform Arbitration Act: Yes or No. By Robert L. Howard, 22 Missouri L. Rev. 223-244 (1957).

Right to Sub-contract: Limitation Implied from Bargaining Agreement, 4 Un. Cal. Los Angeles L.Rev. 662-666 (1957).

State Court Assesses its Jurisdiction and Injunctive Relief Powers under Federal Labor Statutes and Lincoln Mills Decision [McCarroll v. Los Angeles Dist. Council of Carpenters, 315 P.2d 322], 58 Col.L.Rev. 278-283 (1958).

U.S. Arbitration Act Applicable to Collective Bargaining Agreements [*Signal-Stat Corp. v. Local* 475, *United Electrical Workers,* 235 *F.2d* 298], 32 Notre Dame Lawyer 336-339 (1957).

The United States Arbitration Act—A Reevaluation. By Herbert Burstein, 3 Villanova L. Rev. 125-141 (1958).

The Work of the Economic Commission for Europe in the Field of International Commercial Arbitration. By Peter Benjamin, 7 International & Comparative Law Quarterly 22-30 (1958).

On the Lincoln Mills Case

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)

Collective Bargaining Agreements Specifically Enforced under Section 301(*a*) *of the Taft-Hartley Act,* 1957 Univ. of Illinois Law Forum 528-532 (1957).

Enforcement of Labor Agreements—A new Era in Collective Bargaining. By Nathan P. Feinsinger, 43 Virginia L.Rev. 1261-1276 (1957).

Federal Jurisdiction—Enforcement of Collective Bargaining Agreements under Section 301 *of Labor-Management Relations Act,* 36 North Carolina L.Rev. 215-225 (1958).

Lincoln Mills and the Federal Common Law of Collective Bargaining Contracts under Section 301 *of Taft-Hartley: Some Answers and a Question,* 30 Rocky Mountain L.Rev. 62-71 (1957).

The Implications of the Recent U.S. Supreme Court Decisions on Labor Arbitration. By William J. Isaacson, 13 Record of the Association of the Bar of the City of New York 67-84 (1958).

Legislative Purpose and the Judicial Process. The Lincoln Mills Case. By Alexander M. Bickel and Harry H. Wellington, 71 Harv.L.Rev. 1-39 (1957).

Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements. By Charles Bunn, 43 Virginia L.Rev. 1247-1259 (1957).

Lincoln Mills: Labor Arbitration and Federal-State Relations, 57 Col.L.Rev. 1123-1139 (1957).

The Minnesota Uniform Arbitration Act and the Lincoln Mills Case. By Maynard E. Pirsig, 42 Minn.L.Rev. 333-376 (1958).

Section 301 *of Taft-Hartley and the Brooding Omnipresence of William Winslow Crosskey.* By Kurt L. Manslowe, 35 Un. of Detroit Law Journal 201-206 (1957).

Section 301 *of the Taft-Hartley Act—Enforcement of Contracts to Arbitrate Future Disputes,* 11 Vanderbilt L.Rev. 243-246 (1957).

Specific Performance of Arbitration Agreements under Section 301(*a*) *Labor-Management Relations Act,* 3 Villanova L.Rev. 109-111 (1957).

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

SIGNER OF "LETTER OF ADHERENCE" TO A CONTRACT IS BOUND BY THAT CONTRACT'S ARBITRATION CLAUSE. A film producer sought a stay of arbitration on the ground that he had no contract with the Screen Actors Guild, on whose behalf an arbitration was commenced. The court in denying a stay found that petitioner had become a producer under the terms of the "Producer—Screen Actors Guild 1955 Codified Contract for Filmed Commercials" by executing a "Letter of Adherence" in conformity with the contract. Said the court: "The petitioner, by signing the 'Letter of Adherence' became a party to the contract which, by its terms, provided for arbitration should a controversy arise between any producer and member of the Guild, and is bound thereby." *Product Services, Inc. v. Screen Actors Guild,* N.Y.L.J., March 18, 1958, p. 6 (Gavagan, J.).

COURT WILL STAY ARBITRATION AGAINST PARTY NOT A SIGNATORY TO ARBITRATION AGREEMENT, BUT FINDING A VALID CONTRACT, A DISPUTE AND A REFUSAL TO ARBITRATE, IT WILL NOT STAY ARBITRATION AGAINST THOSE WHO SIGNED. Respondent instituted arbitration against the executrix and sole residuary legatee of an estate whose corporate assets were the subject of an agreement between the respondent and the executrix. The sole residuary legatee was not a party to the agreement but signed a document stating that she knew of the agreement and approved of its terms. After execution of the agreement the executrix transferred all the assets of the estate to the sole residuary legatee. Under the terms of the agreement respondent was to be indemnified to the extent of 50 percent of certain taxes levied upon the corporate assets. The agreement also contained a broad arbitration clause and the respondent instituted arbitration of a dispute concerning such indemnification. The court held that the sole residuary legatee not a party to the agreement cannot be forced to arbitrate, although by way of dictum it suggested that under the circumstances she may be bound by the award. *Bock v. Siegel,* N.Y.L.J., January 13, 1958, p. 10 (Martuscello, J.).

ARBITRATION CLAUSE IN A STOCKHOLDERS AGREEMENT COVERING DEVOLUTION OF STOCK HELD BY SEVERAL STOCKHOLDERS IN CLOSE CORPORATION, INAPPLICABLE TO DISPUTE OVER DISCHARGE OF STOCKHOLDER-EMPLOYEES. The court said: "The stockholders agreement, however, was not a general one, covering all their relationship. Instead, it was an agreement, with but minor exceptions, covering the devolution of the stock held by several stockholders in this close corporation. The exceptions related to the continuance of stockholder-employee compensation following death or during disability. These exceptions are not sufficient to embrace the subject matter of the disputes involved here. It has been repeatedly held that no one is under duty to resort to arbitration unless by clear language he has so agreed (*Lehman v. Ostrovsky,* 264 N.Y. 130; *Matter of Kelley,* 240 N.Y. 74)." An order denying a motion to stay arbitration (9 Misc. 2d 282, 167 N.Y.S. 2d 746), was reversed and the arbitration stayed. *Miller Art Co. v. Firestone,* 4 A.D. 2d 1032, 168 N.Y.S. 2d 732.

DISPUTE CONCERNING UNFAIR COMPETITION TRANSCENDS GENERAL ARBITRATION AGREEMENT AND IS A MATTER FOR THE COURTS. Plaintiff sought an injunction pendente lite to prevent the manufacture and sale by defendant of items bearing a TV personality's name under an expired license agreement. The court, in granting the injunction and denying arbitration, ruled that the issue was not referable to arbitration but that "the controversy between the parties, certainly the claim of the plaintiff, is one involving the issue of unfair competition. The action sounds not in contract but in tort, and the issue is not defined by the question of the rights of the parties under the agreement. If the dispute were confined to issues of whether or not the contract was violated, it would be referable to arbitration. But *'the issue involved',* see *Int'l Union, United Automobile v. Benton Harbor Malleable Industries,* 6 Cir., 242 F. 2d 536, 539, 542, is much broader in scope, requiring a consideration of facts and factors beyond the contract." *Wyatt Earp Enterprises v. Sackman,* 157 F. Supp. 621 (S.D. N.Y., Edelstein, J.).

BYLAWS GIVING CORPORATION PRE-EMPTION TO PURCHASE OUTSTANDING SHARES AT VALUE FIXED BY APPRAISERS HELD NOT TO BE AN AGREEMENT TO ARBITRATE FUTURE DISPUTES. Plaintiff sought a declaratory judgment invalidating bylaw that calls for shareholder and corporation each to appoint an appraiser and these to designate a third, a majority valuation to then be binding if the corporation elects to purchase. Plaintiff contended that, in effect, this was a future arbitration agreement which may possibly consider matters other than valuation. Under the applicable Utah Statute agreements to arbitrate future disputes are invalid and unenforceable. However, the court held the bylaw to call for appraisal quite distinct from arbitration, stating that "whether an agreement is one to arbitrate future disputes should depend upon its prospective operation at the time of the agreement and not upon whether in light of subsequent developments it appears of vital import to the parties." *Shumaker v. Utex Exploration Co.,* 157 F. Supp. 68 (D.C. Utah, Christenson, D. J.).

AGENT WHO PROPERLY IDENTIFIES HIS PRINCIPAL WHEN EXECUTING A CONTRACT IS NOT A PARTY TO THE CONTRACT AND IS NOT BOUND TO ARBITRATE DISPUTES ARISING THEREUNDER. The court found that an agent, which signed a charter party with its own name but also added the notation "as agents for the owners" of the vessel, sufficiently disclosed the identity of its principal. The court referred to *Hudson Trading Co. v. Hasler & Co.,* 11 F. 2d 666, where it was said that "the test, particularly in a maritime case, is not whether a principal is named, but rather whether a principal is identified," and held that the description above mentioned "is sufficient to identify the principal for whom the agent is acting." The court ordered the libellant and the owner to arbitrate and held further that the agent is not bound to arbitrate. (Cp. also *Arb. J.* 1957 p. 205.) *Instituto Cubano de Estabilizacion del Azucar v. The SS Theotokos,* 155 F. Supp. 85 (S.D. N.Y., Dawson, D. J.).

ARBITRATION CLAUSE IN CONTRACT CANCELLED BY A SUBSEQUENT AGREEMENT RELEASING PARTIES FROM CLAIMS UNDER PRIOR CONTRACT, AND SUBSEQUENT AGREEMENT NOT CALLING FOR ARBITRATION OF DISPUTES THEREUNDER, CAN BE REVIVED ONLY BY AN EQUITY ACTION TO RESCIND SUBSEQUENT AGREEMENT FOR FRAUD. The defendant sought to revive the prior contract alleging misrepresentation by plaintiff with respect to the subsequent agreement. The court, in holding that "arbitration presupposes the existence of a contract to arbitrate (*Finsilver, Still & Moss v. Goldberg Maas & Co.,* 253 N.Y. 382)," said: "The defendant cannot unilaterally revive the agreement of April 13, 1956, nor can the agreement of February 17, 1957 be, in effect, set aside on this motion [to stay the court action pending arbitration] but only in an action in equity brought for that purpose." *Government of Argentine Republic v. Gaylen Machinery Corp.,* N.Y.L.J., December 25, 1957, p. 3 (Markewich, J.).

EMPLOYER IS BOUND BY ARBITRATION CLAUSE OF CONTRACT WITH UNION DESPITE FACT THAT THIS CONTRACT WAS SUPPLANTED BY ASSOCIATION-WIDE AGREEMENT, where the employer did not formally execute that agreement. Petitioner and union entered into 1951 contract containing arbitration clause. The court found that this concontract was renewed yearly. In 1955 petitioner joined a Dealers Association. Subsequently the Association and the union entered into a contract which did not provide for arbitration. The petitioner never executed this contract formally. A dispute over wages arose and petitioner sought to have a trial pursuant to Sec. 1458 CPA of the existence of a contract to arbitrate. The court in denying petitioner's motion held: "It is evident that petitioner failed to demonstrate that this contract, renewed annually, was completely and incontrovertibly destroyed and supplanted not merely supplemented by the informal (Association) agreement." *Acey Auto Sales v. Amalgamated Local 259, United Automobile Workers,* N.Y.L.J., March 12, 1958, p. 7 (Greenberg, J.).

II. THE ARBITRABLE ISSUE

CLAIM OF FRAUD IN INDUCING CONTRACT IS ARBITRABLE WHERE PARTY MAKING THAT CLAIM FAILED TO RESCIND THE CONTRACT AND ELECTED TO CLAIM DAMAGES FOR FRAUD. The Court of Appeals affirmed the Appellate Division First Dept. decision (digested in *Arb. J.* 1957, p. 113), recognizing the contract and the binding force of its arbitration clause. *Amerotron Corp. v. Maxwell Shapiro Woolen Co.*, 4 N.Y. 2d 722.

DISPUTE OVER GRADING OF EMPLOYEES DOES NOT PRESENT AN ARBITRABLE ISSUE WHERE COLLECTIVE AGREEMENT SPECIFICALLY PRECLUDES ARBITRATOR FROM AUTHORITY TO ESTABLISH JOB CLASSIFICATION. In dismissing the union's petition for an order compelling arbitration, the court said: "It seems to me that the condition in this section, 'It is specifically agreed that no arbitrator shall have the authority to establish a wage rate or job classification . . .' places a distinct limitation upon the arbitrator that covers the situation in hand" and "since contract makes no provision for the Union to be heard on the question of such grading, it seems to me that the question of grading these positions is not open to arbitration." This decision, 157 F. Supp. 270, was affirmed, the court holding that when one of the parties requests specific performance the court "has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration and has broken his promise." The court considers the concept that the arbitrator should determine the arbitrability as persuasive only in terms of inducing the parties to draft their arbitration clauses more broadly. "Hence, whether we look to the terms of the [Federal] Arbitration Act, or whether we look exclusively to the terms of Sec. 301(a) [Taft-Hartley Act], the issue of arbitrability under the collective bargaining agreement is inescapably an issue which the district court must determine for itself as a matter of interpretation of the terms of the arbitration article in the collective bargaining agreement." *Local 149, American Federation of Technical Engineers (AFL) v. General Electric Co.*, 250 F. 2d 922 (First Cir., Magruder, C. J.).

CLAIMS OF DIVISION MANAGERS TO BENEFITS UNDER COLLECTIVE BARGAINING AGREEMENT NOT ARBITRABLE WHEN AGREEMENT SPECIFICALLY EXCLUDED SUPERVISORY EMPLOYEES AS DEFINED IN THE LMRA. The union sought wage increases for division managers of retail stores and the reinstatement of a certain employee to managerial status. The contract clause designated the union as the sole bargaining agent for the employees "with the exception of the Manager, Assistant Manager, Credit Manager, and supervisory employees as defined in the Labor-Management Relations Act." In holding that there was no arbitrable issue under the contract, the court said that "supervisory employees as defined in the Labor-Management Relations Act were excluded from those employees for whom petitioner was recognized as collective bargaining agent and who were subject to the terms of that agreement." *Lathen v. Sears, Roebuck & Co.*, 29 LA 407 (Calif. Super. Ct., Solano County, Greenwood, J.).

CONTROVERSY OVER USE OF OUTSIDE SALESMAN TO DO WORK IN STORE HELD NOT TO BE AN ARBITRABLE ISSUE SINCE SUCH USE IS NOT RESTRICTED BY THE COLLECTIVE BARGAINING AGREEMENT. At bargaining negotiations employer rejected clauses which contained a prohibition against "inside work." However, union contended in this procedure for declaratory judgment brought by employer that such prohibitions were traditional and part of a tacit agreement. The court, in holding that under Sec. 301 Taft-Hartley Act the court has "exclusive jurisdiction to decide the question of arbitrability raised by the plaintiff," noted that the arbitration clause covered disputes concerning interpretation but ruled that the instant case was not a dispute or complaint "arising over the interpretation of the contents of the said written collective bargaining agreement." *Kroger Co. v. Local 347, Meat Cutters,* 29 LA 865 (D.C. S.D. West Virginia, Moore, Ch. J.).

EMPLOYER'S REFUSAL TO REINSTATE STRIKING EMPLOYEES WHOSE SUSPENSION FOR UNLAWFUL ACTIVITIES WAS THEN APPROVED BY ARBITRATOR HELD NOT A DISCHARGE ARBITRABLE UNDER COLLECTIVE BARGAINING AGREEMENT. Employees wrecked company equipment during a strike and were immediately suspended by the company and indicted on a criminal charge. Upon the settlement of the strike employer agreed that their suspension should be submitted to arbitration. After arbitration was commenced upon the sole issue of propriety of suspension, the company notified union that the suspension was irrevocable. The award found the original suspension to have been proper. The union, claiming a discharge grievance, sought to compel the employer to arbitrate. In holding that there was no arbitrable issue, the court reasoned that under the law destruction of company property is *per se* grounds for refusal to reinstate. The strikers' subsequent acquittal of criminal charges "did not improve their legal position. . . . By their conduct they had removed themselves from the protective limits of the Taft-Hartley Act and had forfeited any right they possessed to be reinstated." Since the only consideration that the strikers were entitled to was at the discretion of the company, the arbitration of the suspension as agreed upon was all that these employees were entitled to. *Public Utility Construction & Gas Appliance Workers of the State of New Jersey, Local No. 274, AFL v. Public Service Electric & Gas Co.,* 30 LA 14 (N. J. Sup. Ct., Francis, J.).

DISPUTE OVER ADDITIONAL WORK DONE UPON ORAL REQUEST NOT ARBITRABLE WHERE BASIC CONTRACT REQUIRED WRITTEN AUTHORIZATION FOR SUCH WORK. The petitioner seeking to compel arbitration merely alleged that the work was done "at the specific request of respondent and accepted by respondent." The court denying the motion held that the contract expressly prohibited oral agreements for extra work and further that under the agreement respondent having tendered final payment was released from the contract. *R.G.R. Const. Corp. v. Barry Equity Corp.,* N.Y.L.J., March 11, 1958, p. 6 (Greenberg, J.).

WHETHER WAGE INCREASES GRANTED TO EMPLOYEES TRANSFERRED FROM NEW YORK TO UTAH WERE MERIT INCREASES PRESENTS ARBITRABLE ISSUE. Affirming an order directing arbitration (digested in *Arb. J.* 1957, p. 114), the Circuit Court held that Federal law required the party seeking arbitration to show that the dispute is arbitrable under the contract. Said the court: "We conclude that the Engineers Association has established the existence of an arbitrable dispute. Whether it is correct in contending that the salary increases were granted for considerations other than merit is a question which the parties have agreed to submit to an arbitrator." *Engineers Assoc. v. Sperry Gyroscope Co.*, 251 F. 2d 133 (Second Cir., Waterman, C. J.).

CONTROVERSY OVER CHRISTMAS BONUS HELD ARBITRABLE despite contractual provision exempting "wages and rates of pay" from arbitration where the collective bargaining agreement also required that benefits existing prior to the agreement, unless provided otherwise, were to continue. The court held that the Christmas bonus was a "highly prized" benefit existing prior to the agreement and not included in the "wages and rates of pay" provision. Its abolition gave rise to a grievance and the court therefore ordered specific performance of the arbitration provision of the agreement. *American Lava Corp. v. Local Union No. 222, Int'l Union, United Automobile Workers of America, AFL,* 250 F. 2d 137 (Sixth Cir.).

DIFFERENCES OVER ACCOUNTING NOT ARBITRABLE WHERE PARTIES HAVE EXECUTED VALID RELEASE. Petitioner sought to stay arbitration brought by respondents for an accounting under a contract. Petitioner and one of the respondents had executed a broad general release which by its terms discharged the petitioner from all claims under the contract. The court, in granting a stay, said: "To the extent a release has discharged a claim or contract, there can be no arbitrable issue. . . . There can be no question that as to (respondent) the release was intended to end the life of the contract." The court held that the release was valid and unambiguous and that if the respondent had contemplated a future accounting he should have specifically excepted it from the release. *NTA, Inc. v. Tableau Television, Ltd.*, 169 N.Y.S. 2d 395 (Jacob Markowitz, J.).

WHETHER UNION REPRESENTATIVE HAS A RIGHT TO BE PRESENT AT GRIEVANCE DISCUSSION BETWEEN EMPLOYER AND AN INDIVIDUAL EMPLOYEE DOES NOT PRESENT ARBITRABLE ISSUE, the court holding that interpretation of clause is "beyond dispute." Five employees, suspected of gambling on employer's premises, were taken to the supervisor's office where, under alleged threats, they signed resignations from the company. At that time the employees requested that a union official be present and the request was refused. The contract provided for individual conferences on grievances as follows: "No employee with respect to whom a grievance is pending shall be summoned to the office by any representative of the employer for the purpose of discussing the grievance or wages, hours

or other conditions of employment unless a representative of the union shall be present at such discussion." The union contended that this clause applied to any difficulty of moment arising between employer and employees. The company contended that this provision applied only to the formal grievance procedure. The court, holding that the decision as to whether a bona fide dispute existed is a question for the courts, said: "The provision for union representation . . . consists of but one paragraph contained in Article 26 of the collective bargaining agreement. The article, containing many parts, relates to grievance procedure and is so entitled. One cannot read the article without it being clear 'beyond dispute' that the grievance procedure mentioned is the formalized procedure for the settlement of disputes." This article means that "once a formalized grievance has been instituted the employer shall not discuss the matter with the employee involved in the absence of a union representative. This is the only tenable construction and it is compelled by the language of the contract." In reversing Special Term, 167 N.Y.S. 2d 553, the court granted a motion for stay of arbitration of that issue. *Sarle v. Sperry Gyroscope Co.*, 4 A.D. 2d 638, 168 N.Y.S. 2d 228 (Breitel, J.).

DISPUTE OVER WHETHER EMPLOYEES WERE COERCED INTO RESIGNING IS ARBITRABLE under a broad arbitration clause referring to "claims arising out of breaches or threatened breaches or violations or threatened violations of this agreement." An employer, charging employees with gambling on the premises, obtained their resignations on what the union later claimed was a threat of reporting their activities to the District Attorney. The court, hearing an appeal from an order denying a motion to stay arbitration, rejected the employer's contention that the resignation of the employees "cancelled" the arbitration agreement and thus put the question of alleged duress solely within the jurisdiction of the courts to be decided in plenary litigation. Said the court: "Whether the purportedly voluntary resignation is a voidable act or not involves a determination whether the collective bargaining agreement was violated or not. It is undisputed that the general collective bargaining agreement, *qua* agreement, remains unaffected by any act of either of the two employees. It is this agreement which provides for arbitration. The general obligation to arbitrate, concededly, has not been cancelled. Thus, it is performance under the contract which is in issue, not the contract itself. The resignation, the validity of which is disputed, relates to performance or employment under the contract, not to the contract itself." The court therefore affirmed Special Term which had denied a motion to stay arbitration. *Sarle v. Sperry Gyroscope Co.*, 4 A.D. 2d 638, 168 N.Y.S. 2d 228 (Breitel, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

PRESIDENT OF CLOSE CORPORATION MAY INSTITUTE ARBITRATION AGAINST ANOTHER FIRM WITHOUT APPROVAL OF HIS BOARD OF DIRECTORS DESPITE THE FACT THAT 50 PERCENT OF HIS DIRECTORS WERE ON THE OTHER PARTY'S BOARD AND

WOULD PRESUMABLY VOTE AGAINST INSTITUTING ARBITRATION. In reversing the App. Div. (digested in *Arb. J.* 1956, p. 169), the Court of Appeals distinguished *Sterling Industries v. Ball Bearing Pen Corp.*, 298 N.Y. 483. since in the instant case the President did not ask the board's permission to commence arbitration and, moreover, he was merely implementing a contract clause which had previously been approved by the directors when the contract was entered into. "Authorization of a corporation president to agree to a general arbitration clause amounts to an authorization to the president to carry on arbitrations of such disputes as may arise." Thus the submission by the corporation's president to arbitration was a routine step in the performance of an authorized contract. *Paloma Frocks v. Shamokin Sportswear,* 3 N.Y. 2d 572, 170 N.Y.S. 2d 509 (Court of Appeals, Desmond, J.).

COURT WILL NOT STAY ARBITRATION SOUGHT BY DISSOLVED CORPORATION UNDER CONTRACT ENTERED INTO PRIOR TO DISSOLUTION. Under Sec. 29 of the General Corporation Law corporate existence of dissolved corporations is extended for the purpose, among others, of winding up suits by and against the corporation. Said the court: "This section is broad enough to permit a dissolved corporation to demand arbitration of claims under a contract which can only be determined by arbitration in view of the existence of an arbitration clause." *Milton L. Ehrlich, Inc. v. Unit Frame & Floor Corp.,* N.Y.L.J., January 9, 1958, p. 5 (Conlon, J.).

COURT WILL STAY LIBEL ACTION PENDING ARBITRATION PROCEEDINGS UNDER BROAD ARBITRATION CLAUSE OF THE STANDARD FORM OF CHORUS EQUITY MINIMUM CONTRACT. Plaintiff's libel action was based upon charges causing her dismissal as dancer-singer by defendant. The charges were contained in a letter, explaining the dismissal, sent to Actor's Equity. The court held that under the terms of the contract, which incorporated by reference the Chorus Equity Rules, defendant was bound to give Equity notice of the dismissal. The court said that "the arbitration clause which states 'Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration' shows that the parties intended that a dispute of this nature was not to be the object of a suit." *Barsanti v. Jones Beach Theatre Corp., Show Boat Co.,* N.Y.L.J., January 9, 1958, p. 5 (Conlon, J.).

EQUITY ACTION FOR RESCISSION OF CONTRACT ON GROUND OF FRAUD NOT BARRED BY DOCTRINE OF RES JUDICATA AFTER PRIOR DENIAL OF STAY OF ARBITRATION since the question of rescission was not before the court in the proceedings for a stay. In that prior proceeding plaintiff, seeking to avoid arbitration, averred fraud and deceit by defendant. The court held the arbitration clause broad enough to encompass such a dispute. However, in the instant case, the court noted that no reference had been made in the prior stay proceedings to a rescission remedy based upon fraud and deceit. The court distinguished *Wrap-Vertiser*

Corp. v. Plotnick, 3 N.Y. 2d 17, where the plaintiff had actually commenced an action for rescission and where it was said: "If he (Plotnick) were seeking rescission, none of the items in his arbitration demand could be arbitrated until the issue of rescission had been determined in the courts." The court, in granting plaintiff's motion for a temporary stay, said: "But in the matter before us, rescission is sought, and such an issue is for the court, and not for arbitration. Accordingly, the prior proceeding is held not to be res judicata." *Reo Garment, Inc. v. Jason Corp.,* 170 N.Y.S. 2d 412 (McGivern, J.).

RIGHT TO ARBITRATE UNDER CONSTRUCTION CONTRACT WAIVED BY DELAY IN MOVING FOR ARBITRATION AND BY DEFENDING COURT ACTION. The court, in affirming an order denying a motion to compel arbitration, said: "While we are of the opinion that appellant would not be deprived of the right to arbitration, merely because the agreements sued upon contained no provisions therefor, if in fact the dispute was referable to arbitration under the terms of the construction contracts (*Hosiery Mfrs. Corp. v. Goldston,* 238 N.Y. 22; *Psaty & Fuhrman v. Continental Cas. Co.,* 278 App. Div. 159), that right was waived by appellant's unreasonable delay in making the application for a stay and by the steps taken by it in defending the action." *Clearview Gardens First Corp. v. Little Bay Construction Corp.,* 4 A.D. 2d 875 (App. Div. 2d Dept.).

RESORT TO NATIONAL LABOR RELATIONS BOARD AND FAILURE TO COMMENCE AN ARBITRATION DOES NOT BAR MILK DEALERS FROM STAY OF COURT ACTION PENDING DETERMINATION OF A MOTION TO ENJOIN THE UNION FROM STRIKING IN BREACH OF COLLECTIVE BARGAINING AGREEMENT AND ITS ARBITRATION CLAUSE. The court, granting the application for the stay, held that it had jurisdiction as to the contractual rights of the parties and as such had the right to grant the motion to stay. However, arbitration is not precluded by this application, the court stating: "The mere fact that plaintiffs have not, in the first instance, sought arbitration does not destroy their cause of action. The defendants' remedy is to apply for a stay of plaintiffs' action until the arbitration has been had. *American Reserve Insurance Co. v. China Insurance Co., Ltd.,* 297 N.Y. 322, 326-327." *Maplewood Farms v. Local 584, Int'l Brotherhood of Teamsters,* 164 N.Y.S. 2d 50 (Kusnetz, J.).

COURT WILL NOT ORDER ARBITRATION WHERE GRIEVANCE PROCEDURE OF CONTRACT HAD NOT BEEN EXHAUSTED. Petitioner seeking order directing arbitration merely asserted that respondent orally stated they would not submit to arbitration of a grievance. The collective bargaining agreement set forth a four-step grievance procedure culminating in arbitration. In denying the motion, the court said: "It is quite obvious that before the Court can order arbitration to proceed, the petitioner must show that it has taken the necessary procedural steps to secure arbitration. This it has not done." *De Silva v. Hughes Markets,* 29 LA 697 (Calif. Super. Ct., Los Angeles County, Rhone, J.).

ARBITRATION CLAUSE IN SEPARATION AGREEMENT BECAME INOPERATIVE when wife moved to punish husband for contempt in that he failed to return child and pay for support. The court held that such motion, being inconsistent with the settlement, amounted to repudiation of the settlement agreement, including its arbitration clause, by both parties. The settlement was therefore vacated by the court and with it the arbitration clause became inoperative. *Ariel v. Ariel,* 165 N.Y.S. 2d 986 (Gavagan, J.).

COURT WILL DIRECT ARBITRATION WHERE PARTY SEEKING A STAY OF ARBITRATION HAS NOT SOUGHT AND DOES NOT SEEK TO RESCIND THE CONTRACT ON THE GROUNDS OF PROCUREMENT BY FRAUD. An order directing arbitration (digested in *Arb. J.* 1957, p. 169) was therefore affirmed. *John Bichler v. 100 Lexington Avenue Corp.,* 167 N.Y.S. 2d 877 (App. Div. 2d Dept.).

RIGHT TO ARBITRATION WAIVED BY INITIATION OF COURT ACTIONS IN HOLLAND AND THE UNITED STATES ON SAME CLAIMS. The court, in permanently staying respondent from arbitration, found that it had participated in an action in the Dutch courts, where it had received an adverse determination, and commenced an action in a U. S. Federal Court on the same issues. Said the court: "These procedures and determinations I deem to be a waiver of any right to arbitrate under the contract. Even absent such an adjudication in the Dutch court, the fact that the respondent instituted a cause of action in the United States Court for the Eastern District of New York on the same demand contained in the present demand for arbitration must be considered as a waiver of the permissive right to arbitrate contained in the contract between the parties." Furthermore, the court held that the remaining obligation involved payment and therefore did not present an arbitrable issue. *Denizcilik Bankasi Turk Anonim Ortakligi v. Transatlantic Financing Corp.,* N.Y.L.J., March 11, 1958, p. 6 (Matthew M. Levy, J.).

IV. THE ARBITRATOR

COURT WILL APPOINT THIRD ARBITRATOR WHERE TWO DESIGNATED ARBITRATORS FAIL TO DO SO BECAUSE OF INABILITY TO AGREE. Said the court: "Concededly, six months have elapsed since the designation of arbitrators by the respective contracting parties; and concededly, the arbitrators so designated have been unable to agree upon the designation of a third arbitrator. Under such circumstances the court will appoint a third arbitrator. (*M.A.G. Productions, Inc. v. Motion Picture Mgt. Corp.,* 3 App. Div. 660)." *Messina & Briante, Inc. v. Blitman Construction Corp.,* N.Y.L.J., March 13, 1958, p. 13 (Coyne, J.).

COMPLIANCE WITH COURT ORDER TO DESIGNATE AN ARBITRATOR DEEMED WAIVER OF OBJECTION TO COURT'S JURISDICTION UNDER SEC. 237-a N. Y. CIVIL PRACTICE ACT. In holding that Sec. 237-a applies to arbitration proceedings, the court said: "After a

motion to compel arbitration has been granted, and the party against whom the order is issued has complied by appointing an arbitrator, it is too late for that party subsequently to raise the issue of the court's jurisdiction in opposition to an application under sec. 1452 for the court appointment of a third arbitrator. The time for appellant to raise its jurisdictional objection was when the motion was made to compel arbitration under sec. 1450. By failing to do so at that time and by complying with the order entered upon that motion, appellant waived any statutory rights it might have had. Section 237-a then ceased to be available or applicable." *Glatzer v. Insurance Research Service,* 5 A.D. 2d 8, 168 N.Y.S. 2d 774 (App. Div. First Dept.).

V. THE PROCEEDINGS

COURT WILL ENJOIN PARTY FROM PROCEEDING WITH FOREIGN COURT ACTIONS BASED ON CONTRACT DISPUTE WHERE SERVICE OF DEMAND FOR ARBITRATION IN NEW YORK PRECEDES COMMENCEMENT OF FOREIGN ACTIONS. After plaintiff, a Delaware corporation, had served a demand for arbitration in New York on December 4, 1957, defendant, a Maryland corporation, on December 6 instituted suit in a Delaware court upon the contract and sought to have arbitration enjoined since under Delaware law a pending court action precludes arbitration. The court held that under New York law the service of the demand initiates a special proceeding (*Shine's Restaurant v. Waiters,* 113 N.Y.S. 2d 315; *Hall v. Sperry Gyroscope,* 130 N.Y.S. 2d 505), giving the New York court prior jurisdiction over the matter. A motion to enjoin the defendant from proceeding with the foreign actions was therefore granted. *Shahmoon Industries v. Day & Zimmermann, Inc.,* 169 N.Y.S. 2d 950 (Lupiano, J.).

PARTIES DEEMED TO HAVE AUTHORIZED ADMINISTRATOR TO FIX PLACE OF ARBITRATION WHEN CLAUSE STATES THAT ARBITRATION SHALL BE HELD PURSUANT TO AAA RULES. Rule III, Section 10, the court said, "provides that if the locale of the arbitration is not designated in the contract or submission, or agreed upon by the parties, 'the administrator shall have power to determine the locality and its decision shall be final and binding.' Respondent thus voluntarily permitted the fixing of New York as the place of arbitration." *Staklinski v. Pyramid Electric Co.,* N.Y.L.J., March 3, 1958, p. 6 (Gold, J.).

ONLY UNION AND EMPLOYER MAY ARBITRATE GRIEVANCES UNDER COLLECTIVE BARGAINING AGREEMENT EVEN THOUGH INDIVIDUAL EMPLOYEES ARE "PARTIES IN INTEREST" IN AN ACTION TO COMPEL ARBITRATION. Agreement set forth preliminary steps and arbitration procedure for grievances including discharges. Individual discharged employees commenced court action to direct employer to arbitrate. The court, in overruling employer's demurrer that plaintiffs were not proper parties in interest, ruled that the union is in effect an agent of its members and therefore each member is an unnamed but real party in interest. Nevertheless, the court held that the terms of the collective bargaining

agreement were binding upon the employees as principals and thus the union and the employer, as the sole parties entitled to arbitration, are therefore entitled to apply to the court for the enforcement of the arbitration provisions. *Arsenault (Local 203, IUE-CIO) v. General Electric Co.*, 29 LA 655 (Conn. Super. Ct., Fairfield County, Troland, J.).

INDIVIDUAL EMPLOYEES WHO HAVE PROPERTY RIGHTS TO BE CONSIDERED IN ARBITRATION BETWEEN UNION AND EMPLOYER CANNOT INTERVENE AS OF RIGHT BUT ONLY UPON PROOF THAT REPRESENTATION OF THEIR INTEREST BY UNION IS INADEQUATE OR OF POSSIBLE ADVERSE EFFECT BY DISTRIBUTION OF PROPERTY WITHIN CONTROL OF THE COURT. The union filed a notice of arbitration under an arbitration clause. The employer moved to stay the arbitration, alleging that the dispute was outside the scope of the clause. Two employees, for themselves and on behalf of all other workers covered by the collective bargaining agreement, moved to intervene in the proceedings, under Sec. 193(1), 193(b) and 195 of the Civil Practice Act. The court held that these sections of the Civil Practice Act refer to actions rather than to special proceedings, and article 84, the New York Arbitration Statute, does not expressly provide for such intervention. However, "if intervention be appropriate in arbitration proceedings, as indicated by the dictum in *Donato v. American Locomotive Co.*, 283 App. Div. 410, 415-417, (aff'd without opinion 306 N.Y. 966), Section 193-b of the Civil Practice Act—the general intervention statute—relied upon by the proposed intervenors must be applied in all its aspects." The court examined the provisions of 193-b(1) and found only two alternative grounds possible for intervention by individual employees in an arbitration proceeding between union and employer: 1. proof that representation of their interest by their own collective bargaining agent is or may be inadequate, 2. "they are so situated that they may be adversely affected by the distribution or other disposition of property in the custody of, or subject to the control of, or disposition by the court or an officer thereof." There being no such showing of either of these grounds, the motion to intervene was denied. *General Warehousemen's Union, Local 852, Int'l Brotherhood of Teamsters v. Glidden Co.*, 169 N.Y.S. 2d 759 (Kusnetz, J.).

INDIVIDUAL EMPLOYEE MAY NOT INVOKE ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENT WHERE NEITHER EMPLOYER NOR UNION WANTS THE GRIEVANCE ARBITRATED. The court, finding no collusion between the union, which had accepted a discharge as justified, and the company, said: "The only parties to the agreement are the employer and the union. An examination of the agreement, both in its entirety and with special reference to the grievance and arbitration procedure, makes it clear that there is no intention on the part of the employer or the union to give individual members of the union the right to demand arbitration. A three step grievance procedure is provided for which can lead to arbitration, but it is clear that the contending parties in arbitration are to be the employer on the one side and the union as the

accredited representative of the individual union members on the other." The court referred to *Bianculli v. Brooklyn Gas Co.*, 115 N.Y.S. 2d 715, where it was said on p. 717: "The philosophy of the union in retaining control over disputes and of the company in retaining the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of a union would create a condition of disorder and instability which would be disastrous to labor as well as industry." *Brettner v. Canada Dry Ginger Ale, Inc.*, and Local 153, Office Employees International Union, AFL-CIO, 168 N.Y.S. 2d 180 (Christ, J.).

VI. THE AWARD

AWARD GRANTING SPECIFIC PERFORMANCE OF CONTRACT BY ORDERING RESPONDENT TO RESTORE PETITIONER AS "MANAGER OF PRODUCTION AND ENGINEERING" CONFIRMED. Respondent's Board of Directors, claiming that in their discretion petitioner was physically unable to perform his duties, terminated his position. The arbitrator, finding petitioner capable of attending to his duties, ordered the company to restore him. The court, referring to *Matter of Devery*, 292 N.Y. 596|, *Matter of United Culinary Bar & Grill Employees*, 299 N.Y. 577, and *Matter of Ruppert*, 3 N.Y. 2d 576, held that the parties by agreeing to arbitrate under AAA rules incorporated AAA Rule 42 into their contract. This rule provides that the arbitrator "may grant any remedy he deems just and equitable . . . including specific performance of a contract." The court said: "The fact that our courts, were petitioner the plaintiff in an action, would not grant specific performance does not necessarily deprive arbitrators of the right to grant such relief, especially where the parties have expressly agreed that they might do so." *Staklinski v. Pyramid Electric Co.*, N.Y.L.J., March 3, 1958, p. 6, (Gold, J.).

AWARD CREDITING STATE DEP'T WITH ACCOMPLISHMENT IN SETTLING DISPUTE WITH FRENCH GOVERNMENT IS "EQUIVOCAL" WHERE ISSUE BEFORE ARBITRATOR WAS WHETHER LAWYER WAS INFLUENTIAL IN SETTLEMENT FOR CLIENT. The court held that under the circumstances an action to recover lawyer's fee from client was dismissed without prejudice. The lawyer-client contract provided for compensation if named third party determined that recovery of client's claim against the French Government resulted from lawyers' efforts. Third party stated, in his determination, that but for the intervention of the U. S. State Department "the case would have previously been finally decided adversely to the interests of [the client]." The court ,in dismissing the plaintiff's suit to recover compensation, held that the determination did not seem to be the determination required under the agreement. It was too ambiguous to sustain the action. However, the dismissal was without prejudice so that plaintiff could amend his complaint to include allegations that would clarify the determination. *Corcoran & Kostelanetz v. Dupuy*, 166 N.Y.S. 2d 112 (Conlon, J.).

AWARD CONFIRMED WHERE THERE IS ONLY A "MERE POSSIBILITY" THAT IT IS IN EXCESS OF ARBITRATORS' POWERS. Special Term had found it possible that the arbitrators had assessed damages on items expressly eliminated. The court said: "We cannot agree with Special Term that the mere possibility of an award being in excess of arbitrators' powers, at least as far as that possibility is presented in this case, is warrant for vacating an award and remitting it for redetermination or correction. . . . The burden was upon petitioner to show that in fact the award made was in excess of the arbitrators' authority." Petitioner having failed to sustain that burden, the Special Term vacature was reversed and the award confirmed. *Deering Milliken & Co. v. Boepple Sportswear Mills,* 4 A.D. 2d 652, 168 N.Y.S. 2d 760.

AWARD TO EFFECT THAT A SHIPMENT WHICH HAD BEEN REFUSED AS UNTIMELY WAS IN FACT TIMELY WAS MODIFIED TO PERMIT THE BUYER TO EXAMINE GOODS. Contract provided for period of ten days after "receipt" within which to examine and reject goods. Buyer refused to accept goods, claiming untimely delivery. The court said: "Although the arbitrators found that the shipment was timely, they could not deprive petitioner of its contractual right to examine goods," and ruled that the time to inspect had not expired at the time of the award, since the buyer had not received the goods. *Riverdale Frocks v. J. L. Stifel & Sons,* N.Y.L.J., January 8, 1958, p. 6 (Conlon, J.).

AWARD CONFIRMED DESPITE ARBITRATOR'S EXCLUSION OF EVIDENCE AND ALLEGATIONS OF MISCALCULATIONS where excluded evidence was not shown to be relevant. Holding that exclusion of evidence by the arbitrator is reviewable only under Sec. 1462(3) of the Civil Practice Act, the court said: "Mere refusal to receive evidence is not sufficient to vacate; the evidence excluded must be shown to be clearly relevant to the disputed issue (*Gervant v. New England Fire Ins. Co.,* 306 N.Y. 393, 400)." With respect to alleged errors of calculation the court, in applying Sec. 1462-a(1) of the Civil Practice Act, found that the alleged errors were based on certain presumptions of fact and that "the arbitrators may properly have found to the contrary, and with such finding the settled law (requiring no citation of precedent) bids us rest content." Nor is the arbitrator required to set forth his rationale, under the authority of *Shirley Silk Co. v. American Silk Mills,* 257 App. Div. 375. *John Post Const. Corp. v. Good Humor Corp.,* 170 N.Y.S. 2d 383 (Matthew M. Levy, J.).

ENFORCEABILITY OF AWARD IS COMMON LAW RIGHT EXISTING EXCLUSIVE OF THE ARBITRATION STATUTE OF THE STATE. A suit was brought in a Federal Court to enforce a Pennsylvania arbitration award, the jurisdiction based on diversity of citizenship. Defendant's assertion that under the 1927 Pennsylvania arbitration statute an award can be enforced only in a Pennsylvania court, was refuted, the court saying: "Such a proposition is not the law. The Act of 1927 is remedial only; proceedings

under it are cumulative and non-exclusive. The Act did not do away with the right to bring suit to recover an arbitration award." The court found no evidence that parties intended strict conformity to the statute and ruled that the award was one at common law. *Hartmann Coal Mining Co. v. Hoke,* 157 F. Supp. 313 (D.C. E.D. Pennsylvania, Ganey, D. J.).

COURT WILL NOT NULLIFY AWARD AND DIRECT DE NOVO PROCEEDINGS WHERE PARTY MERELY FAILED TO ASSERT HIS RIGHT TO REPRESENTATION BY COUNSEL. Petitioner, desirous of counsel, was aided in presentation by two union members who advised him concerning counsel "not to make an issue over same." The court held that Sec. 1454(1) was inapplicable to this case since "the record shows that petitioner did not waive counsel nor was he deprived of it. He merely failed to avail himself of his right to the full. Counsel of a sort he did have. If he was ill-advised by his union associates, that is no fault of respondent." This being a civil matter, petitioner was deemed to know the law and it was not required that the arbitrators advise him of his rights. *Rosengart v. Armstrong Daily,* 9 Misc. 2d 174 169 N.Y.S. 2d 837 (Kusnetz, J.).

ARBITRATION CLAUSE IN A LEASE WHICH PROVIDED FOR SELECTION OF ARBITRATORS BUT DID NOT CONTAIN PROVISION FOR FILING OF AWARD, HELD TO BE COMMON LAW ARBITRATION REQUIRING SEPARATE COURT ACTION TO ENFORCE AWARD IN COLORADO. Rule 109(b) of the Rules of Civil Procedure of Colorado requires that "the parties before they make their submissions, shall execute a written agreement that they will submit all matters, or some particular matter of difference, to the arbitrator named therein, and will abide the award, and that the award may be filed with the clerk of the district court, as a basis of a judgment, and that an execution may be issued for its collection." The court, holding that statutory arbitration must "conform to the statute in every respect and a deviation therefrom negates the procedure," found no written agreement or evidence to the effect that the parties agreed that the award could be filed as a basis of judgment. The award of the arbitrators having been filed, the court ordered that it be removed, since execution in a common-law arbitration, as opposed to statutory arbitration, can only follow a judgment in an action on the award. *Koscove v. Peacock,* 317 P. 2d 332 (Supreme Court of Colorado, Holland, J.).

FEDERAL COURT HAS JURISDICTION TO ENFORCE AWARD UNDER SEC. 301(a) TAFT-HARTLEY ACT. Under a broad arbitration clause an award covered the entire question of the employer's liability for vacation pay during the vacation period. The court held that the employer, by submitting to arbitration, waived the preliminary grievance steps in the contract and that the court had jurisdiction to enforce the award, since the claim for vacation pay involved the enforcement of the collective bargaining agreement rather than the enforcement of the personal rights of individual employees. *Clothing Workers v. Kornman Co.,* 41 LRRM 2276 (D.C. M.D. Tenn.).

KANSAS COURTS NOT BARRED BY SEC. 301(a) TAFT-HARTLEY ACT FROM JURISDICTION IN ACTION BY EMPLOYER TO VACATE AWARD. The Kansas Supreme Court, in reversing, found that an award which interpreted an ambiguous "average bonus earnings" clause did not exceed the arbitrators' powers. The court further held that the cause of action in the instant case was not one for violation of a collective bargaining agreement contemplated by the Federal Statute and that the use of the word "may" in the section giving the Federal Courts jurisdiction indicates that state courts possess concurrent jurisdiction. *Coleman Co. v. United Automobile Workers,* 41 LRRM 2113 (Kansas Sup. Ct., Nov. 9, 1957).

AWARD CONFIRMED, INTERPRETING "ANTI-PYRAMIDING" CLAUSE NOT TO HAVE BEEN VIOLATED BY A RETURN TO WORK AT REGULAR STARTING TIME AFTER OVERTIME WORK, BUT BEFORE PRESCRIBED REST PERIOD WAS OVER. The court said: "The anti-pyramiding clause is not so clear that the interpretation placed on it by the arbitrator does violence to its language and thereby becomes a forbidden alteration or amendment of the collective agreement itself. The view taken by the arbitrator was certainly a permissible one and, therefore, within his competence. The choice [of interpretation] lay with the arbitrator to whom the parties referred their controversy. They are concluded by his award." The court therefore granted its confirmation. *Genuth (as Secretary-Treasurer, Local 50, Bakery and Confectionery Workers Int'l Union, AFL-CIO) v. S. B. Thomas, Inc.* 168 N.Y.S. 2d 328 (Hofstadter, J.).

AWARD WHICH REFERS ONLY GENERALLY TO PROPERTY CONVEYED IS NOT INDEFINITE AND WAS THEREFORE UPHELD UNDER COLORADO LAW. The matter submitted to the arbitrator concerned the amount of consideration and the terms of payment under a contract for the sale of real property. Colorado law, the court said, "over a long period of time, has recognized and favored arbitration as a convenient method of adjusting disputes. . . . Arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside because of a mistake of the arbitrator in either." thus the court said, the arbitrator's decision as to the dispute submitted to him was final and binding upon the parties." The court held that since the question of the property conveyed was not before the arbitrator, "the general reference in the award to the property was a sufficient description for the purpose of the award." *Western Oil Fields, Inc. v. Rathbun,* 250 F. 2d 69 (Tenth Cir., Pickett, C. J.).

AWARD ENJOINING TEAMSTERS UNION "SLOW DOWN" HELD NOT TO EXCEED POWER OF ARBITRATOR. Union contended that the injunction was forbidden under Sec. 876-a of the Civil Practice Act, which requires the existence of certain facts prerequisite to an injunction. The court, holding that arbitrators have the power to direct such conduct of parties necessary to settle the dispute, found that the arbitration agreement contemplated the use of an injunction in such an award since the proceeding provided for was a "speedy arbitration" and injunctive relief was

the only practical remedy available. In holding that Sec. 876-a was not applicable to this situation but rather to the issuance of injunctions "in labor strife," the court said: ". . . arbitration is voluntary and there is no reason why unions and employers should deny such powers to the special tribunals they themselves create. Sections 876-a and article 84 (Arbitration) are both in our Civil Practice Act. Each represents a separate public policy and by affirming here we harmonize these two policies." The Court of Appeals affirmed the decision below digested in *Arb. J.* 1956 p. 112. *Jacob Ruppert v. Int'l Brotherhood of Teamsters,* 3 N.Y. 2d 576 (N. Y. Ct. of Appeals, Desmond, J.).

OHIO COURT DECLINES TO GIVE "FULL FAITH AND CREDIT" TO A JUDGMENT BASED UPON AN AWARD UNDER PENNSYLVANIA ARBITRATION STATUTE. Creditor brought an action in Ohio to enforce a Pennsylvania judgment based upon an arbitration award. The Ohio court, aware that it was bound to give full faith and credit to valid "judgments" of sister states, considered a judgment entered upon a Pennsylvania award not pertinent in this respect, though the Pennsylvania Arbitration Statute provides that awards "shall have the effect of a judgment." 23 Ohio Jurisprudence Sec. 3 defines a judgment as "the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record." The court continues: "It must be noted that judgments are rendered by Courts. The award of the arbitrators is neither made by, nor approved by, any Pennsylvania court, although by Pennsylvania Law it is granted 'the effect of a judgment with respect to the party against whom it is made' . . ." The court reasons that full faith and credit extends "only to judicial proceedings and does not extend to matters not included within the definition of a judicial judgment, 9 Ohio Jur. 2d Sec. 24. In the record of the proceedings of the Pennsylvania Court no judgment is shown. The Courts of Ohio are therefore not bound to enter a judgment in Ohio upon what appears to be solely an award made by arbitrators in the State of Pennsylvania, regardless of the effect which the laws of Pennsylvania may give to such award." The plaintiff having failed to prove a judgment entitled to full faith and credit, the petition was dismissed. *McClure v. Boyle,* 141 N.E. 2d 229 (Birrell, J.).

ENGLISH JUDGMENT ON AWARD NOT SUBJECT TO MERGER DOCTRINE IN ACTION ON AWARD IN NEW YORK. Default judgment upon a London arbitration award, which had only partly been satisfied, was obtained in the English courts. Plaintiff, because of jurisdictional problems, brought an action in New York based not upon the default judgment, but upon the award. Defendant asserted that the award merged into the judgment under English law and therefore could not be the basis of an action. The court, rejecting defendant's contention, said: "Upon the present application plaintiff, for the first time, raises the point that the doctrine of merger, though applicable to the judgments of this state and sister states, is not applied to judgments of foreign countries. The authorities support this distinction (*Swift v. David,* 9 Cir., 181 F. 828; *New York, L.E. & W.R. Co.*

v. McHenry, C.C., 17 F. 414; Freeman on Judgments (5th Ed.), Vol. 3, Sec. 1502; *Sargant v. Monroe,* 268 App. Div. 123, 49 N.Y.S. 2d 546; 31 Am. Jur., Judgments, Sec. 538). In *Sargant v. Monroe, supra,* the plaintiff who had obtained an English judgment on an English arbitration award, which judgment could not be enforced here, was nevertheless held entitled to sue upon the award in the courts of this state." *Oilcakes and Oilseeds Trading Co., Ltd. v. Sinason Teicher Inter American Grain Corp.,* 170 N.Y.S. 2d 378 (Markowitz, J.).

AWARD CONFIRMED UNDER FLORIDA STATUTE, WHERE THERE IS NO PROOF OF GROSS NEGLIGENCE OR MISBEHAVIOR OF ARBITRATORS. The Supreme Court of Florida unanimously reaffirmed that "the court will not review the findings of fact contained in an award, and will never substitute their judgment for that of the arbitrators." *Merritt-Chapman & Scott Corp. v. State Road Dept.,* 98 So. 2d 85 (Hobson, J.).

AN EDITORIAL

(*Continued from Page* 2)

Governments of countries with a federal structure, such as Canada, the Union of South Africa, Australia and the United States, would be confronted with serious difficulties of a legal and practical nature in adhering to a multilateral convention, even though it might contain a so-called federal-state clause whereby provisions that come within the legislative jurisdiction of constituent states or provinces would not be applicable to such states. Indeed, federal-state relations in the United States affect procedures in state courts where arbitration awards must often be enforced.

It is all the more gratifying to note that the United States Government, which did not participate in previous considerations of the Draft Convention at the United Nations, will participate in the forthcoming Conference through a delegation of United States officials. This is of great importance for the advancement of unification of enforcement proceedings, because the Conference will have the benefit of the American experience in the use and expansion of foreign trade arbitration and its practices. The Convention may have great implications for the development of the international law of commercial arbitration and may influence statutory provisions of countries which are trading partners of the United States.

The Conference will not only consider the Draft Convention, but also measures to increase the effectiveness of international commercial arbitration, which a memorandum of the U. N. Secretary-General characterized as "promoting the unification of arbitration laws, encouraging the conclusion of arbitration treaties and advocating the standardization or at least the coordination of the rules of procedures of existing arbitral bodies." Here, recent American experience may be of special interest. A Draft Uniform Law on Arbitration has been adopted by the National Conference of the Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association. It has been enacted in Minnesota, and also served as the basis for the new Florida Arbitration Code, in force since October 1, 1957.

Arbitration agreements on the inter-governmental level, such as those embodied in the recent commercial treaties of the United States mentioned above, though important, are not the only effective means of facilitating foreign trade arbitration. Arrangements between

commercial organizations for the mutual use of services in various countries, may be of even greater value. Here, the AAA has concluded agreements with organizations in England, South Africa, Australia, Japan, and India; negotiations with organizations in other countries are under consideration.

Another aspect not to be overlooked is educational work, in the broader sense of the word, for the promotion of the use and knowledge of international commercial arbitration on a national level. It is in the interest of the domestic trader and his counsellor to become aware of the various possibilities of using international commercial arbitration as a means of settling foreign trade disputes. Participation of arbitral bodies in meetings of bar associations and trade groups thus becomes important, in view of the increasing activity of the legal profession in counselling international business transactions.

Practice arbitrations and symposia on arbitration law and procedure have been held in the United States in increasing numbers. The teaching of arbitration law and practice has been undertaken in many law schools, such as Yale, California, Georgetown and New York University, where courses also dealing with foreign trade arbitration have formed a regular part of the curriculum in recent years.

It is to be hoped that consideration of the various means of improving commercial arbitration, for which United States experience may serve as a good example, will give new impetus to the effective settlement of disputes in the field of foreign economic relations.

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: *All contributions to AAA by gift or membership enrollment are tax exempt.*